No. 41279-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

TIMOTHY P. COOGAN, et al.

Appellants,

vs.

TERESA SCHMIDT,

Respondent.

APPELLANTS COOGAN REPLY BRIEF/ OPENING BRIEF ON CROSS-APPEAL

BEN F. BARCUS, WSBA# 15576
PAUL A. LINDENMUTH, WSBA #15817
LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, P.L.L.C.
Attorney for Appellant
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444

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I. INTRODUCTION

Respondent, Schmidt concedes, at Page 2 of her opening brief "A new trial is precisely that: A new trial". Obviously, when addressing such a proposition, Ms. Schmidt appears to be indicating that it is a new trial only with respect to the issues favorable to Ms. Schmidt, and was not a "new trial" with respect to the defenses raised by Mr. Coogan. It is respectfully suggested that the positions taken by the Respondent are analytically incorrect.

In this case, Respondent Schmidt failed to file a brief which conformed with the dictates of RAP 10.3(a)(5) because it does not contain "a statement of the case". Rather sprinkled throughout the brief are various factual assertions, often without any meaningful citation to the record. Although it is understood that typically "substantial compliance" is sufficient with respect to the rules of appellate procedure, in this instance, the failure of the Respondent Schmidt to comply with the rules of appellate procedure have resulted in a brief which is extremely difficult to respond to, because it fails to cite to appropriate authority or to the record, resulting in a document, which for lack of better terms, is extremely "disjointed". See, *Millikan v. Board of Directors*, 92 Wn.2d 213, 215 595 P.2d 533 (1979), (lack of strict compliance with procedural requirements of rule of appellate procedure will not prevent appellate

review when there is no prejudice to the other party, and fairness to the Trial Court **or significant inconvenience to the Appellate Court).**

The purpose of the rules governing contents of appellate briefs is to enable the court and opposing counsel to efficiently and expeditiously review the accuracy of factual statements made in the brief and efficiently and expeditiously review the relevant legal authority. See, *Litho Color, Inc., v. Pacific Employers Ins. Co.* 98 Wn.App. 286, 991 P.2d 638 (1999). It is not the obligation of either the opposing counsel nor the Appellate Court to search through the record to find factual support for a party's position. See, *Mills v. Park,* 67 Wn.2d 717, 409 P.2d 646 (1966). As such, contentions within a brief should be disregarded when or not appropriately supported by reference to the record, or by appropriate argument. See, *Bruce v. Bruce* 48 Wn.2d 229, 292 P.2d 1060 (1956). See also, *Sherry v. Financial Indemnity Company* 160 Wn.2d 611, 615 n1, 160 P.3d 31 (2007). Passing treatment of an issue, or a lack of reason argument sufficient for meaningful review, permits the Appellate Court to simply disregard a party's contentions. See, *State v. Stubbs* 144 Wn.App. 644, 652, 184 P.3d 660 (2008), reversed on other grounds, 170 Wn.2d 117, 240 P.3d 143 (2010). In many instances, there is an inadequate citation to any meaningful authority for many of the propositions set forth within Respondent's opening brief. As such, the court should decline to

consider such contentions posited by the Respondent Schmidt. See, *Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 809, 821 P.2d 549 (1992).

Frankly, in many respects Respondent's opening brief in this case is reminiscent of the Appellant's opening brief in the case of *Durand v. HIMC Corp,* 151 Wn.App. 818, 214 P.3d 189 (2009), of which this court observed at Page 828 n.6:

> The appellant's frequently failed to assign error to the Trial Court's rulings, do not cite authority for arguments, improperly make arguments on the statement of the case, do not properly request attorney's fees, and seem to ask as to review non-appealable issues simply because the Trial Court did not rule in their favor.

Although in *Durand*, the court ultimately exercised its discretion to consider the issues raised by the appellant in the *Durand* case, under the same principles, the court should **decline, to exercise discretion and review a number of the assertions set forth within Respondent's opening brief.**

Beyond the technical deficiencies, referenced above, the respondent's illogical position that "a new trial is new trial", while at the same time trying to preclude the defendant from asserting "new issues" during the course of that "new trial" is simply unsupportable. As conceded by Respondent Schmidt, once an Appellate Court has issued a

ruling which results in the grant of a "new trial", it is as if the first trial never occurred. As discussed in *Hudson v. Hapner* 146 Wn.App. 280, 287, 187 P.3d 311 (2008), reversed on other grounds, 170 Wn.2d 22, 239 P.3d 579 (210):

> ... Although a trial has occurred, upon reversal of the judgment, our reversal of the judgment returns the proceeding to the same posture as if it had not. See *Weber v. Biddle* 72 Wn.2d 22, 28 431 P.2d 705 (1967); cf.15A Carl B. Tegland and Douglas Ende, Washington Practice, Civil Rules §67.18 at 1514 (2007) (if Trial Court dismisses plaintiff's case but is reversed on appeal, case simply proceeds as if it were never dismissed).

As our Supreme Court observed long ago in the case of *Goddfroy v. Reilly* 140 Wn. 650, 250 P.59 (1926), that when a Appellate Court reverses and remands a case for retrial on the grounds that the evidence was insufficient to take a particular issue to the jury, such actions do not restrict the retrial to that issue alone. Under such circumstances the parties are at liberty to retry the case on all issues, including those that were decided in the party's favor in the first trial, as well as those issues which were already determined. Id. Such a proposition should be deemed equally applicable in a case that is remanded for a limited purpose, such as a tort action, like this, for a redetermination on the issue of damages. Under such circumstances, both parties are free to address every aspect of such an issue, including the ability to present alternative theories relating

to damage issues, which had not been previously presented during the course of the first trial. See, *Lewis River Golf, Inc. v. O. M. Scott and Sons* 120 Wn.2d 712, 724-25, 845 P.2d 987 (1993). The *Lewis River Golf* case also suggests that even when a new trial is limited to the issue of damages, it nevertheless is incumbent upon the plaintiff to establish what damages were proximately caused by the already determined breach of duty.

It is further noted by way of introductory comments that Respondent Schmidt, has a rather bizarre view with respect to the scope of the remand, and the issues which were appropriately before the Trial Court on retrial. The operative opinion for the purposes of examining the scope of the remand in this case, is this Court's unpublished opinion of July 2, 2008, noted at 143 Wn.App. 1030 (2008), review denied, 165 Wn.2d 1030, 203 P.3d 379 (2009). That opinion, was a byproduct of a remand from the Supreme Court, after it reversed this Court's determination regarding the sufficiency of evidence relating to liability. Under such circumstances the Supreme Court "... remanded to us to consider the remaining issues. We affirm the Trial Court's denial of Coogan's Motion to Dismiss and its grant of a new Trial on damages."

Within the operative section of that opinion, this Court primarily focused in on the erroneous past economic damage award, which was

unsupported by the evidence presented during the course of the first trial. Nevertheless despite that focus, this Court affirmed the Trial Court's determination to grant a new trial limited to damages, and presumptively all aspects of the Trial Court's prior reasons for doing so, which not only included an erroneous economic damage award, but also on other issues set forth in the first Trial Court's Findings of Fact and Conclusions of Law which were entered prior to the first appeal. Such findings, conclusions served to order a new trial on damages, not only because of issues regarding economic damages, but also due to issues relating to the availability of non-economic damages, the inappropriate injection of the lack of insurance evidence / plea of poverty, as well as plaintiff's counsel flagrantly abusive closing argument. Further, even if it cannot be presumed that the Appellate Court in its unpublished decision intended to affirm all matters animating the Trial Court's determination to grant a new trial in this case, the mere fact that the Appellate Court did not reach all issues raised by Mr. Coogan, simply **does not mean that the Appellate Court necessarily rejected, and sub silentio reversed all other rationale utilized by the Trial Court in granting a new trial limited to damages.**

A practical and rationale reading of the Appellate Court's operative unpublished decision is that the reason the Court declined to

reach such additional issues, is because it intended to remand the case for a new trial on the issue of damages, and such a remand served to remedy the concerns encompassed by the alternative grounds upon which the Trial Court rested its decision to grant a new trial limited to damages. See, *State v. Jones* 148 Wn.2d 719, 722, 62 P.3d 887 (2003). Otherwise, as discussed in *State v. Jones* at 722, this Court's failure to address the additional issues raised by Mr. Coogan within his first appeal, would undermine and eviserate "an appeal as of right". As explored in *Jones,* had the Appellate Court not intended that such issues to be remedied by the grant of a new trial limited to damages, it would have been obligated to address the remaining issues, or at least explain while it was not obligated to do so. *Id.* It is noteworthy that despite the fact that the Appellate Court only addressed the erroneous award of economic damages in the operative unpublished opinion, the remand for a "new trial on the issue of damages" was not by its terms solely limited to that issue. Thus, Ms. Schmidt's observation in Page 2 of her brief that somehow, based on the prior appellate proceedings in this case, that Ms. Schmidt was entitled to an award of "general damages arising out of Mr. Coognan's malpractice" is simply erroneously, in that the remand by this Court was for a plenary redetermination of **all issues relating to damages.** The same is true with respect to Ms. Schmidt's observation in Page 11 regarding

dicta within the Appellate Court's first decision in this case regarding Ms. Schmidt's alleged injuries caused by the underlying slip and fall event.[1]

In any event, such an observation is pure "dicta" because the Court of Appeals in that decision found there to be insufficient evidence regarding the underlying slip and fall liability, under "case within a case" principle. Language within a court of appeals opinion that has no bearing on an outgoing case "dicta" or "obiter dictum" and is not binding. See, *DCR, Inc. v. Pierce County* 92 Wn.App. 660, 683 n16 964 P.2d 380 (1998) (statements in a case that do not relate to an issue before the court and are necessary to decide the case, constitute obiter dictum and need not be followed, i.e., dicta is not controlling precedent). The first opinion in this case ultimately determined that there was no liability due to insufficient proof, thus, any discussion relating to Ms. Schmidt's alleged damages, by its very nature was "dicta" and should be afforded no binding affect. As it is, any such observations are trumped by the fact that the

[1] Substantially different evidence was presented during the course of the second trial, regarding Ms. Schmidt's physical condition and alleged injuries. Such evidence included the fact that she had a multitude of other automobile and/or other accidents between the slip and fall event and the second trial in this case, which clearly, if not undisputedly, called into the question the bonafide nature of Ms. Schmidt's claim she suffered ongoing symptomology related to the underlying slip and fall event nearly 15 years after its alleged occurrence. It is noted that confusingly, the defendant at Page 11 cite to the unpublished version of the first opinion in this case which was subsequently published at 135 Wn.App. 605, 145 P.3d 1216, and the specific quote set forth at Page 11 of Ms. Schmidt's brief, is at Page 609 of that opinion, which was subsequently reversed by the Supreme Court at 162 Wn.2d 488, 173 P.3d 273 (2007).

Trial Court, granted a new trial on the issue of damages, and this Court, in the above-referenced opinion affirmed such a result **in its entirety.**

Permeating Respondent Schmidt's reply brief is a marked misunderstanding of the "law of the case doctrine". See, *Adamson v. Taylor* 66 Wn.2d 338, 339, 402 P.2d 499 (1965). Initially it is noted that the *Adamson* case relied on by Respondent Schmidt, has been substantially modified by the adoption of RAP 2.5(c)(1)and (2). The original purpose of the rule stated within *Adamson*, (now modified by RAP 2.5(c)), was to ensure that following an appeal and remand, a party could not within a subsequent appeal reach back in a second appeal, and allege error with respect to events which have transpired prior to the first appeal. See 1 ALR 725 (current pocket part 2011). The purpose of the doctrine obviously is to prevent piecemeal appeals. *Id.*

Such concerns, simply are not implicated by what has occurred in this case. Without overstating what is already obvious, Appellant Coogan simply could not raise, in the first appeal, Ms. Schmidt's failure to prove an essential element of her claimed damages, which occurred during the course of the retrial of this case. The reason why it is obvious, is because Mr. Coogan could not predict the utter failure of Ms. Schmidt to present any proof regarding "collectability" during the course of retrial in this matter.

Further, as the "law of the case doctrine" has been modified by RAP 2.5(c) it is noted that both the trial and appellate courts have the discretion to address and/or to resolve issues, even if, it was a legal issue that had been previously decided in a prior appeal, if such a decision was wrong, or if the application of the law of the case doctrine would result in a manifest injustice, and there would be no injustice to the other party. See, *Hogan v. Sacred Heart Medical Center* 122 Wn.App. 533, 94 P.3d 390 (2004). In this case, even if we assume arguendo that the "law of the case doctrine", even applies, when the error at issue occurred during the course of the subsequent retrial, to apply the doctrine under these circumstances would work a "manifest injustice", because Mr. Coogan has been subjected to a judgment based on damages which were unproven. See also, *State v. Trask* 98 Wn.App. 960, 978-79, 990 P.2d 976 (2000) (The law of the case doctrine does not apply to matters which were not explicitly or implicitly consider, and is highly discretionary with respect to matters that were considered by the Appellate Court).

The application of the law of the case doctrine, as advocated by Respondent Schmidt in this case, would eviscerate the Supreme Court's holding in *The Lewis River Golf, Inc.,* case, cited above, which held that upon remand a party is not precluded from bringing forth new evidence or alternative theories within the presentation of their case. See also,

generally, *Roberson v. Perez* 156 Wn.2d 33, 40, 123 P.3d 844 (2005). (Courts, always have the discretion to consider questions, which affect the right to maintain the action); see also, *Bennett v. Hardy,* 113 Wn. 2d 912, 918, 784 P.2d 1258 (1990). The law of the case doctrine only applies to legal issues, and does not apply to the issues which were presented in a first appeal but were not decided. *Buob v. Feenaughty Machinery Co.,* 4 Wn. 2d 276, 282, 103 P.2d 325 (1940). Further, when upon retrial the evidence presented is notably different than that presented in the first trial, the law of the case doctrine is not applied. *Id.*

Here, as discussed below, substantially different evidence was presented with respect to Ms. Schmidt's damages, and as such, the law of the case doctrine should not be deemed to preclude any issues raised in this second appeal.

Finally by way of introductory comments it is noted that sprinkled throughout Respondent Schmidt's opening brief are six invocations of "CR11" apparently in an effort to punctuate Ms. Schmidt's counsel's disagreement with the position taken by appellant herein. Such invocations of CR11 are not accompanied by any meaningful analysis, or citation to authority, thus such efforts should be disregarded. *Cowiche County Conservary v. Cosley, supra.* Further, although, it is likely that some of Respondent Coogan's arguments may make Respondent's

counsel uncomfortable, it is suggested that as discussed below, such discomfiture is a byproduct of his own conduct which is appropriately being raised as an issue within this appeal because it served to deny Mr. Coogan a fair trial. Simply by invoking CR11, does not make weak, unsupportable arguments any better.

II. REPLY ARGUMENT

A. Respondent Schmidt Failed to Prove an Essential Element of Her Damage Claim, i.e., "Collectability". As a Result, the Judgment of the Trial Court Should Be Reversed and This Matter Remanded with Directions to Dismiss.

As discussed in detail above, there are simply no procedural bars to Courts' consideration of Appellant Coogan's argument regarding the failure of the Plaintiff/Respondent to prove an essential element of her claim, i.e., that any underlying judgment would have been "collectable". In fact, beyond the efforts to erect a procedural bar to the consideration of such an issue, the Plaintiff/Respondent provided no meaningful response to Appellant's contention that collectability is an essential element of plaintiff's claim for damages. (See, Appellant's Opening Brief, at Pages 27 through 30).

Apparently, Respondent Schmidt fails to recognize that this case involves a claim of attorney malpractice, and is not simply a run of the mill personal injury case. As discussed in *Kim v. O'Sullivan* 133 Wn. App. 557, 564, 137 P. 3d 61 (2006) an essential element of Ms. Schmidt's claim of legal malpractice is to prove that she suffered damages. The purpose of tort damages is to place the plaintiff in a condition were she would have been had the wrong not occurred. *Id.* citing *Tilly v. Doe* 49 Wn. App. 727, 731-732, 746 P. 2d 323 (1987). The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Id.* See also, *Matson v. Weidenkopf*, 101 Wn. App. 472, 3P.3d 805 (2000).

As further discussed in *Kim*, to ensure that legal malpractice damage awards accurately reflect actual losses, and to avoid windfalls, the burden is on the plaintiff to show that damages are collectable.

As stated in *Matson* at 484 "... collectability of the underlying judgment **is a component of damages in a legal malpractice action**".

As such, although proximate cause principals clearly are what dictate what is or is not the "measure of damages", "collectability" is an issue of damages, as opposed to purely an issue relating to "proximate cause". As a new trial on "damages" was ordered in this case, clearly such

a grant of a new trial must be considered in light of the actual measure of damages applicable to the claim in this case.

Further as discussed in *Lavigne v. Chase, Haskell, Hayes and Calamon*, P.S. 112 Wn. App. 676, 683-86, 50 P. 3d 306 (2002) the burden of proof squarely falls upon the client, in this instance Ms. Schmidt, to prove that any underlying claim would have been "collectable" from the third party, had the claim been appropriately handled. In *Lavigne*, the appellate court adopted "the majority position" that proof of collectability is "a component of the plaintiff's prima facie case", citing to K*lump v. Duffus* 71 F. 3d 368, 1374 (7th Cir. 1995). As discussed in *Lavigne* hypothetical damages, beyond what the plaintiff would have genuinely collected from the judgment creditor or collected in the underlying action, are a windfall and inappropriate.

As Respondent Schmidt, was the one bringing claims against Mr. Coogan, one would hope, that she would have a basic understanding of the core elements of the claim she was bringing against her former lawyer and employer. Apparently, she did not possess such an understanding. Otherwise, she would clearly understand that in a legal malpractice case, the "**measure of damages**" is the amount she actually would have been able to collect from the third party, and not the potential value of the underlying injury claim. Such a proposition has been fully

applied in other jurisdictions, even when the underlying claim involves personal injury. See, *McKenna v. Forsythe and Forsythe* 28 A.D. 2d 79, 83-84, 720 N.Y.S. 2d 654 (2001) (collecting cases); see also, *Paterek v. Peterson and Ibold*, 890 N.E. 2d 36 (2008) (plaintiff in legal malpractice case, where underlying issue was a personal injury claim, had the obligation to prove collectability and can look to available insurance coverages as proof on that issue).

In this case, the record is devoid of any effort on the part of the plaintiff to prove that any underlying judgment against the "Grocery Outlet" where she suffered her slip and fall, would have been collectable. There was **no evidence** presented with respect to whether or not the Grocery Outlet had insurance, or for that matter what the limits were on such insurance coverages. There was **no evidence presented with respect to the structure of the Grocery Outlet**, or whether the ownership group would have had personal assets sufficient to pay any excess judgment. **There was simply no evidence presented regarding the issue of collectability.**

The position taken by Respondent Schmidt, even if given credit, that she did not have to prove "proximate cause", in and of itself makes absolutely no sense. Such argument is extremely disingenuous, given that Respondent Schmidt, within her own jury instructions submitted, as

plaintiff's proposed Instruction No. ___, was a "proximate cause" instruction. (Appendix No. 1) (CP 2277-2298). Additionally, without exception, the Trial Court instructed the jury by way of Court's Instruction No. 1 on the issue of proximate cause. (Appendix No. 2) (CP 1306-1320). The Respondent Schmidt was well aware that despite the fact the new trial was limited to questions of damages, it was still incumbent upon her to prove a causal link between the alleged negligence and any damages she was claiming. Unfortunately, for Ms. Schmidt, she apparently had a marked misunderstanding as the measure of damages applicable to her claim.

Judgment as a matter of law pursuant to CR 50 is appropriate when a party fails to prove an essential element of their claim. See, *Estate of Bordon Ex Rel. Anderson v. DOC* 122 Wn. App. 227, 244, 95 P. 3d 764 (2004) (Trial Court erred when it denied state's motion for judgment as a matter of law at the conclusion of plaintiff's case in chief). Further, judgment as a matter of law after a jury verdict (J. N. O. V.) is appropriate when viewing all the evidence in a light most favorable to the non-moving party, it can nevertheless be said, as matter of law that there is no competent and substantial evidence upon which the verdict can rest. See, *Guijosa v. Wal-Mart Stores, Inc.* 144 Wn. 2d 907, 915, 2 P. 3d 205 (2001). "Substantial evidence" is something more than a "mere scintilla of

evidence". *Young v. City of Seattle* 60 Wn. 2d 805 807, 376 P. 2d 443 (1992). Judgment as a matter of law is warranted when the verdict is founded merely upon theory or speculation. *Chaussee v. Maryland Casualty Company* 60 Wn. App. 504, 508, 803 P. 2d 1339 (1991).

Here there was simply no evidence regarding the issue of collectability, and Respondent Schmidt's contention that grainy photographs submitted at time of trial for the purposes of showing generally the condition of the Grocery Outlet at the time of Ms. Schmidt's slip and fall, somehow constituted evidence on that issue, is specious and laughable.[2] (Ex. 23) (Cp 321).

The "pictures" referenced at Page 9 of Respondent's brief which "showed shelves overflowing with inventory" and Ms. Schmidt's testimony that the store was "large and busy going concern" is simply not evidence of collectability, and even if one could strain to find that it is, it constitutes nothing more than a scintilla of evidence with respect to the

[2] At Page 9 of respondent's opening brief it is suggested that the remedy if Appellant Coogan is to correct on the issue of collectability is a new trial, as opposed to a remand with direction to dismiss. Naturally as are most of Respondent's contentions, such a proposition is argument without citation of any meaningful authority, and as such should be disregarded. Respondent raised the issue of collectability pretrial, during trial, and after trial. In response to defendant Coogan's multiple motions to dismiss, at the close of plaintiff's case in chief, at the close of the evidence and by way of post-trial motion, Ms. Schmidt made no effort to either reopen her case, or provide the Court by way of offer of proof, any proof regarding such issues. As such, having had ample notice and an opportunity to address such issues during the course of the retrial of this matter, the Respondent should be deemed foreclosed from once again trying to raise such an issue, once the error has been pointed out and subject to an appeal. As it is, under the above-referenced judgment as a matter of law standards, it is clear that the remedy is dismissal.

issue of collectability. First, it is noted that the photographs of the store which were admitted into evidence, were taken on an unknown date. This is significant, because as the Court may recall, the underlying basis for the malpractice claim was the fact that Mr. Coogan had not failed to serve process, but rather had failed to serve process on the group or person who owned the Grocery Outlet at the time of Ms. Schmidt's slip and fall. Following Ms. Schmidt's slip and fall, the Grocery Outlet changed hands, had new ownership, which Mr. Coogan had served. Not knowing when the photo was taken, it provides no indication as to the wherewithal of the ownership at the time of the slip and fall event.

Additionally, there is simply no indication with respect to who owned the particular inventory being depicted within the photograph. As far as we know, such inventory could have been subject to UCC filings, or was placed into the store on a consignment basis. In other words, there is no indication that such products would have been subject to execution. Further, as far as we know, the debts of the Grocery Outlet, both at the time the photographs were taken, or the time of Ms. Schmidt's slip and fall, substantially exceeded any available assets. To assert, that because the Grocery Outlet was a going concern, which had inventory on its shelf, as being evidence of "collectability", constitutes nothing more than guess,

speculation and conjecture. As indicated above, a verdict simply cannot rest on such flimsy grounds.

With regard to Respondent's "fifth" contention argues that Mr. Coogan "made it that much harder for Ms. Schmidt to demonstrate "collectability", assuming it was ever timely put at issue", as a basis for an estoppels, due to his "own misdeeds", simply ignores the observations which were made by this Court in its initial opinion in this case which although overruled on other grounds made the following observation at Page 613:

> Still, Schmidt suggests that we employ a more lenient standard to Schmidt's obligation to prove her underlying case. She points to Coogan's failure to investigate in his last minute filing of the complaint. Schmidt cites to no authority to support this argument. **More importantly, she offers no evidence that her malpractice attorney was frustrated in proving the underlying slip and fall by Coogan's delay.** We would be more sympathetic to her position if she had shown that evidence of the store's actual or constructive notice had been available to Coogan and it was not available to her malpractice attorney. In short, we find neither legal nor equitable grounds to lower Schmidt's burden of proof because of the nature of Coogan's malpractice." (Emphasis added).

The same is true with respect to the issue of collectability. It is undisputed, and cannot be disputed that the record is devoid of any indication that Ms. Schmidt's malpractice attorney, Mr. Bridges, ever made any effort to engage in discovery with regard to such issues. No

subpoena was ever issued to the Grocery Outlet, or its former ownership group, in order to determine what insurance or assets they may have had available. No subpoena duces tecum was ever issued to any insurance company, who possibly insured the Grocery Outlet. In other words, Ms. Schmidt's counsel simply cannot point to Mr. Coogan as an excuse for his own discovery failings and his failure to prove an essential element of Ms. Schmidt's claim. Such efforts are disingenuous, unsupported by the record or to any meaningful citation to authority. Such self-serving contentions simply should be disregarded. The Trial Court was simply wrong on this issue, and it was error for her not to direct a verdict at the close of Plaintiff's case in chief and thereafter. (RP 508).

B. **The Trial Court Erred by Failing to Direct a Verdict and Provide A Limiting Instruction with Respect to Ms. Schmidt's Damages When the Admissible and Competent Evidence Only Established Her Injuries Were Limited to a Short Period of Time Following Her Slip and Fall Injury and for Permitting the Jury to Consider Future Damages Which Were Clearly Unsupported by the Evidence.**

Respondent Schmidt's discussions regarding medical causation issues, are so disjointed and muddled that it is difficult to respond. With regard to the notion that somehow Mr. Coogan is foreclosed from raising

these issues due to the prior appeal is addressed above, and should be rejected by this Court. With respect to the remaining issues set forth at Pages 12 through 25 of Ms. Schmidt's Opening Brief, it is suggested that the easiest way to respond to such scattered arguments is to simply address the basics.

As our Supreme Court recently reiterated in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606-07, 260 P.3d 857 (2001), "expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability." This is because typically where personal injuries are involved, such matters generally involve obscure medical facts which are beyond the ordinary lay person's knowledge, thus expert testimony is necessary in order to establish causation. See, *Fabrique v. Choice Hotels International, Inc.,* 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). See also, *Bradley v. Walmart Stores, Inc.*, 544 F. Supp. 2d 1167, 1170 (W.D. Wn. 2008), citing to *Riggins v. Bechtel Power Corp.,* 44 Wn. App. 244, 254, 722 P.2d 819 (1986). Although it is true that an injury victim can testify about their past and current medical conditions, that in and of itself does not establish the necessary requisite causal link between an accident and injury, which otherwise would justify the presentation of such issues to a jury. See, *Riggins v. Bechtel Power Corp.,* 44 Wn. App. at 253. It is only when the

results of an act of negligence are within the experience and observation of an ordinary lay person, that the trier of fact can draw a conclusion as to the causal link without resort to medical testimony. See, *Sacred Heart Medical Center v. Carrado*, 92 Wn.2d 631, 600 P.2d 1015 (1979).[3] As shall be explored in detail below, contrary to Ms. Schmidt's assertions, there was simply **no evidence by way of expert medical testimony, indicating that Ms. Schmidt, beyond a limited time period, suffered any ill effects as a byproduct of her 1995 slip and fall.**

Lay testimony under the circumstances **of this case**, simply was insufficient to maintain a 15-year causal link, particularly given the substantial evidence presented that there had been a number of intervening events and injuries at the exact same areas of Ms. Schmidt's body which was at issue in this case. The Trial Court allowing contentions that Ms. Schmidt continued to suffer the ill effects of the 1995 accident, some 15 years later, despite a number of intervening events, without any support

[3] The case of *Leek v. U.S. Rubber, Co.*, 9 Wn. App. 98, 511 P.2d 88 (1973) relied on by the respondent is clearly distinguishable. In *Leek*, there was both expert medical testimony and lay testimony establishing that the condition at issue in that case, was recurring at time of trial and there were no potential intervening causative factors. Thus under such circumstances, naturally it would not have been error to permit the jury to consider future damages, even if it was not established that the condition was "permanent". See also, *Bitzan v. Parisi*, 88 Wn.2d 116, 588 P.2d 775 (1977) (lay testimony sufficient to establish future pain and suffering **in combination with expert medical testimony indicating that the plaintiff had suffered the ill effects of his accident-related injuries up to the time of trial**). In this case, there was simply **no expert medical testimony establishing that beyond April 1997 Ms. Schmidt was in any way suffering the ill or adverse affects from her 1995 alleged slip and fall event. In fact, all medical evidence was to the contrary and her and her lay witness testimony was insufficient, as a matter of law to establish the contrary.**

of competent medical testimony clearly was erroneous. It was clearly erroneous for the Trial Court to permit the jury to consider any future impact of the 15-year-old slip and fall event, past the date the date of trial and into the future, even if Ms. Schmidt is correct that there was no requirement that there be testimony supporting that her slip and fall injuries were "permanent."[4]

What is at issue here is the sufficiency of the evidence, and not mere credibility issues. To the extent that Ms. Schmidt, is attacking counsel for Mr. Coogan with respect to his position regarding the evidence, it is noted that such *ad hominem* attacks, and idiotic assertions of "violations of CR 11" are simply an effort on the part of Ms. Schmidt to obfuscate the abysmal failure of the proof she presented at time of trial with respect to her slip and fall related injuries.

Attached hereto as Appendix No. 3 to this memorandum is the full and complete copy the testimony of Dr. Brobeck, Ms. Schmidt's forensic examiner. It is noted that by way of motion in limine, Mr. Coogan sought to strike the testimony of Dr. Brobeck, which related to a 2001 examination and which was perpetuated in the year 2003, as being

[4] Given the fact that Ms. Schmidt's slip and fall event occurred in 1995, and the trial occurred in the year 2010, it would be hard to imagine how she could be continuing to suffer the ill effects from the 1995 event, if the injury suffered at that time, was not "permanent. " However, this issue ultimately does not turn on such semantics.

obsolete, and due to serious concerns relating to spoliation. The Trial Court's failure to strike Dr. Brobeck's testimony, *ab initio*, (in limine), is simply another example of the "cumulative error" which occurred in this case. (RP 10/20/10, p. 52)[5] On close examination of Dr. Brobeck's testimony, was, and is, exactly as characterized by appellant Coogan. When directly asked what injuries were caused by the 1995 slip and fall, Dr. Brobeck forthrightly testified as follows:

> "Q Okay, doctor, just wrap this up, did you reach any conclusions or diagnosis on a medically more likely than not basis as to the injury Ms. Schmidt sustained due to the 1995 slip and fall in the store?

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[5] Dr. Brobeck was not a treating physician, but rather a forensic examiner hired by Ms. Schmidt. Dr. Brobeck initially prepared a report regarding his findings following the 2001 examination of Ms. Schmidt. (RP 8/20/10, p. 32) That report, apparently, was available during his 2003 perpetuation deposition which was presented at time of trial. Prior to retrial in this case, Mr. Coogan repeatedly demanded that Dr. Brobeck's report be provided. Ms. Schmidt refused to do so alleging that the report was apparently was "lost", even though, he was a retained forensic examiner in this case. Thus to the extent that Ms. Schmidt currently is trying to take advantage of any confusion within Dr. Brobeck's testimony, that clearly could have been resolved had the report been available, such effort should not be permitted by this Court. (See, Pages 21 through 22 of Schmidt's opening brief and the matter set forth therein). Spoliation is the intentional destruction of evidence. See, *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 380-81, 972 P.2d 475 (1995). Spoliation occurs when relevant evidence, which properly should be part of a case, is within the control of a party whose interest it would be to naturally produce it and when they fail to do so without satisfactory explanation, the only inference which a finder of fact may draw is that such evidence would have been unfavorable. *Id.* The remedy for spoliation is to apply a rebuttable presumption which shifts the burden of proof to the party who destroyed or altered the important evidence. *Id.* In this case, there is simply no plausible excuse provided for the failure of Ms. Schmidt to provide Dr. Brobeck's report. Such behavior was also consistent with Ms. Schmidt's provision of a report from a Dr. Klein, which was only partially produced, and what was produced, ended at the point where Dr. Klein began discussing the nature and extent of Ms. Schmidt's injuries as a result of the 1995 slip and fall. (Ex. 12) (RP 8/20/10, p. 31) (RP 526). At some point, Ms. Schmidt's failure to produce such evidence, as well as the discovery abuse discussed herein, simply serves to strain credulity with respect to the bone fide nature of Ms. Schmidt's cause.

A **I felt that she sustained a cervical/dorsal sprain/strain related to the injury of December 23, 1995, on a more probable than not basis.**

(Appendix 1, Page 20). (CP 380-81).

Thus, when directly asked Dr. Brobeck testified all that Ms. Schmidt suffered as a result of the 1995 was simply a "cervical/dorsal sprain/strain." **He did not say, that she suffered a permanent disc injury, and for Ms. Schmidt to suggest otherwise is clearly simply an effort to mislead and/or confuse the Court. Her congenital spinal disc problems were preexisting.**

The mere fact that Ms. Schmidt had a sprain/strain injury which was superimposed over her preexisting degenerative changes and congenital conditions, does not mean that she suffered any kind of a permanent condition from the alleged slip and fall. To the extent that Dr. Brobeck indicated that her degenerative change and/or congenital condition was permanent in nature, (would not get better), **simply does not mean** that any symptoms as a result of the superimposed sprain/strain would not resolve over a period of time. The mere fact that her preexisting degenerative change and congenital condition were not likely to resolve, is simply meaningless with respect to whether or not she would be suffering symptoms from a sprain/strain condition some 15 years after

the event, and after a substantial number of intervening injuries to the exact same location on Ms. Schmidt's body.

In fact, if one closely examines Dr. Brobeck's testimony, it is clear that in 2003, based on his 2001 exam, he could not say on a more probable than not basis whether the complaints of Ms. Schmidt in 2001, (i.e., at the time of his exam), related to the 1995 slip and fall or her April 1, 1997 auto accident, where she received injury to the exact same location of her body and for which she sought treatment from an entirely different group of healthcare providers.

Placed into proper context, the only reasonable reading of Dr. Brobeck's testimony is that the complaints that Ms. Schmidt had in 2001, inclusive of those discussed at Page 38 of his testimony were her current symptoms as of the 2001 exam:

> Q: Okay, all part of the same evaluation, all right. On Page 6 [of the missing report] I noted Paragraph 1, 2, 3, 4 and see if I can quote it correctly. It says, 'Ms. Schmidt relates her symptoms decreased to the point that if she went about activities of daily living, she did not have symptoms. However, if she attempted to play ball or throw a baseball with her son or open a drawer, she developed symptoms.', end quote. Is that comment now is that referring to the evaluation overall of the two injuries – I mean, the injuries that were alleged on 1995, the slip and fall, and the motor vehicle, or this is subsequent to both those accidents? ... [Objection by Mr. Bridges followed up by an additional question.]

> Q: After reading through this quickly, I note that you've done – you've done evaluation of the whole – of all her injuries. I mean, the injuries that she allegedly got in the car wreck and the injury she allegedly got in the slip and fall in 1995. Now, in that particular paragraph [the one referenced in the above question] that I just read into the record, does that refer to the result of both injuries or the result of the injury – or your examination or just what does that refer to?
>
> A: I'm not sure. It could be either/or. I'm not sure.
>
> Q: So you can't say with specificity whether that refers to post slip and fall or post slip and fall and the post automobile accident?
>
> A: Correct.

Thus, a fair reading of Dr. Brobeck's own testimony establishes that by 2001 he simply could not say whether any ongoing symptomatology was a byproduct of the 1995 event for which Mr. Coogan as a matter of law had responsibility or the 1997 accident, an accident for which Mr. Coogan holds no responsibly. The 1997 injuries were new and unrelated. (RP 529-530) (Exhibit No. 3).

The preposterous nature of Ms. Schmidt's position with respect to medical causation and the adequacy of the stale and obsolete medical testimony which she presented at time of trial, is further evidenced by her post slip and fall medical history. On the date of the 1997 automobile accident, April 1, 1997 Ms. Schmidt presented herself to the emergency

department at Saint Joseph's Hospital, and indicated she had no prior history of neck problems. (Ex. 2A) (Appendix No. 4) (Ex. 15) (CP 404).

Following the 1997 accident she saw a Dr. Robert Klein. Dr. Klein's report has been partially suppressed, but in his initial physical and history, it is clearly indicated that Ms. Schmidt, at that time, was complaining of injuries from the 1997 automobile accident directly relating to the exact same areas of her body, which she had previously complained about as a result of the 1995 slip and fall. What records are available from Dr. Klein indicated that he viewed all of his treatment at that point in time as being related to an "MVA". (Ex. 12) (Appendix No. 5).

In addition, as a result of the 1997 accident Ms. Schmidt sought out the treatment of neurosurgeon Richard Wohns, M.D. (CP 407-408). Within the history she provided to Dr. Wohns, Ms. Schmidt provided a substantial history regarding her April 1, 1997 motor vehicle accident as being the source of her complaints, and was dismissive of her 1995 injuries:

> In December 1995 she fell on a cement floor in a store, and noted neck pain and headache. She was treated conservatively and had an MRI scan three months later. **She improved and not had any cervical pain for months prior to the MVA**. (Emphasis added.) (Ex. 3) (Appendix No. 6).

[6] In addition, Ms. Schmidt's Group Health records which span a period from 1988 until at least 2006, show that she clearly did not seek treatment for either the 1995 slip and fall nor the 1997 automobile accident, or even mentioned such events when she was seeking treatment at Group Health in 1998 and 1999. In fact, in a healthcare questionnaire filled out by Ms. Schmidt in January 1999 she told Group Health, that she was otherwise assessed as "an otherwise healthy adult female" who suffered from hypothyroidism. (CP 409-412) (CP 537).

The Group Health records are significant not only due to the absence of any entries relating to Ms. Schmidt's alleged neck and back condition in the 1998/1999 timeframe, but they also serve to reveal a number of other incidents relating to falls in her home, the result of which she was complaining about neck pain. By September 30, 2005 it is noted within Ms. Schmidt's Group Health records that "this is a 38-year-old woman who is here for follow up on back pain which is both upper trapezius pain on the left, mid thoracic pain and low back pain. **She is**

[6] It is suggested that as discussed infra, it somewhat again "strains credulity" that Ms. Schmidt actually lacked sufficient resources to seek out medical care, as she testified to at time of trial. On April 1, 1997 she had no compunction or reservation about seeking treatment at the ER for her automobile accident-related injuries. She was able to seek care from Dr. Klein and a neurosurgeon in 1998, and likely other healthcare providers who were never disclosed to the defense in this case. She was engaged to a lottery winner.

now several weeks out from a couple of falls down stairs that occurred in her home..." (CP 391-398) (Ex. 13A) (Appendix No. 7).

Further, rendering the position taken by Ms. Schmidt even more absurd, i.e., that 15 years after this slip and fall, all of her problems were related to it, were records presented at time of trial, that in the year 2006 she had epidural injections and surgery relating to her fall in the home-related neck injuries. (Ex. 7).

Finally, in the year 2009 Ms. Schmidt **once again** was involved in a motor vehicle accident where **once again** she was complaining about neck injuries. (Ex. 16). According to the records of her then treating chiropractor Joel D. Vranna, D.C. on December 7, 2009 Ms. Schmidt was a passenger in a automobile collision which occurred at 23rd and Union in Tacoma. Within such treatment records she provides nothing relating to her 1995 slip and fall, but does make note of her prior neck surgery. At that time Ms. Schmidt was attributing all of her back and neck problems to the 2009 motor vehicle accident. (CP 417-420).

Given such a complex medical history, it was simply outlandish and was a gross abuse of discretion for the Trial Court to permit Ms. Schmidt to argue that she received anything but a limited injury which resolved as a byproduct of the 1995 slip and fall accident. Oddly, and rather tellingly, the plaintiff did not seek any recompense for any medical

treatment after 1996. (RP, p. 500) (Ex. 24). It is inherently contradictory for the Trial Court to have found that Ms. Schmidt could not collect on special damages post 1996, based on limited evidence, but to instruct the jury on future general damages **fourteen** (14) years later. (RP 503). Her medical records clearly indicate as such, and Dr. Brobeck's testimony simply does not provide any indication to the contrary. Thus, for the Trial Court to allow Ms. Schmidt to seek damages for a 15-year timeframe, given her complex medical history, without clear medical testimony indicating that her symptoms were causally related to the 1995 slip and fall accident, particularly given the history of substantial other injuries, surgeries and the like, was clearly inappropriate. Such impropriety was further compounded by the Trial Court instructing the jury that they could award her future damages for her 1995 slip and fall related injuries. Such matters are not simply questions of credibility, they are matters of factual sufficiency, and the appropriate medical foundation for the submission of such issues to the jury.

What was at issue at trial, was the sufficiency of the medical testimony which must meet certain standards, and not the creative advocacy on part of plaintiff's counsels, with respect to such deficient evidence.

The circumstances in this case, make the facts within the case of *Torno v. Hayek*, 133 Wn. App. 244, 135 P.3d 536 (2006) look pale in comparison. In that case, the appellate court upheld the exclusion of evidence when it was established that the testifying dentist could not provide any opinions with respect to the current condition of the plaintiff, because he had not see her for over a 2 1/2-years and as a result did not know her present condition, or what if any future treatment would be necessary. Here, it was an abuse of discretion for the Trial Court not to exclude Dr. Brobeck's testimony which provided no information with respect to Ms. Schmidt's present condition, her need for any future care or the likelihood of her having accident-related symptomatology into the future.

Alternatively, it was clearly incumbent upon the Trial Court to limit the damages available in this case to the testimony actually provided. As such, it was clearly an abuse of discretion for the Trial Court not to direct a verdict and limit Ms. Schmidt's damages claims to her medical proof, i.e., that she suffered various symptoms as a result of the 1995 slip and fall accident which ultimately resolved prior to her 1997 automobile accident. (RP 8/20/10 p. 36-37) (RP p. 493-495) (CP 1124-1237).

Frankly, the only competent testimony on such issues that were presented by Mr. Coogan's forensic examiner, Dr. Cofelt. Dr. Cofelt

opined Ms. Schmidt suffered very limited injuries, and there was simply no testimony or facts which served to rebut such undisputed testimony. The only competent evidence before the Trial Court and the jury was that Ms. Schmidt's slip and fall related injuries were limited. (RP 515). It should be considered reversible error mandating a new trial that the Trial Court failed to recognize such limitations.

C. Ms. Schmidt's Testimony Regarding Lack of Insurance was Nothing More Than Plea of Poverty Calculated to Stir the Passions and Prejudices of the Jury.

As one continues to read through Respondent Schmidt's opening brief, it is something akin to watching the movie "Apocalypse Now". As one continues down the "river" things simply become stranger and stranger. The notion that the Appellant, somehow interjected "insurance" into this case simply because his counsel referred to "Group Health" which was one of Ms. Schmidt's healthcare providers is certainly a novel concept. While in hindsight, one can suppose that since Group Health is "HMO", some jurors might surmise that it is a form of healthcare insurance, but such an issue was never raised during the course of trial, and as such was waived. It is far from clear that a jury, simply hearing the name "Group Health" necessarily would think "insurance". See, *Collins v. Clark Fire District No. 5, 155* Wn. App. 48, 231 P.3d 1211 (2010) (vague reference to availability of insurance coverage, not grounds for a reversal

of verdict when argument unsupported by legal authority, or any meaningful discussion of how the jury would necessarily have interpreted the statements as referencing to insurance). In order for an error to be preserved, particularly as it relates to comments of counsel occurring during the course of trial, it is necessary that such alleged misconduct be subject to a timely objection and a request for a curative instruction. *Id.*

Here, to the extent that some jurors may have taken "the leap" and determined that a reference to Group Health somehow is a reference to a healthcare insurer, any such issue could have been addressed by the Trial Court by the issuance of a curative and/or limiting instruction explaining to the jury that they are only to consider the name "Group Health" for the purposes of identifying plaintiff's treatment provider. Having failed to make such an objection to the Trial Court, or a request seeking a limiting and/or curative instruction, there is no question that Respondent Schmidt has waived any contentions or concerns regarding the utilization of the term "Group Health" during the course of trial.

In addition, as such an issue was never raised before the Trial Court, it is simply not an issue that can be raised for the first time on appeal. See, *Wilson Son Ranch, LLC v. Hintz*, 162 Wn. App. 267, 303-04, 253 P.3d 407 (2001) (appellate courts will not entertain issues raised for the first time on appeal); RAP 2.5(a). The reason that appellate courts do

not entertain issues raised for the first time on appeal is because the Trial Court should be afforded an opportunity to correct errors in the first instance, thereby avoiding unnecessary appeals and the need for a re-trial. *Id.*

Had Respondent Schmidt raised this rather novel issue regarding the name "Group Health", it is something that could have been readily addressed by the Trial Court by way of a limiting and/or curative instruction, and directions to the parties on how the identity of this particular healthcare provider should be addressed. Perhaps in that regard as suggested by Schmidt's counsel at Page 26, "Group Health" could have been referenced as "treatment" or treatment by a doctor on "X date" and that would have addressed Ms. Schmidt's belated concerns, such suggestions, simply come too late on appeal.

In his oral ruling granting plaintiff's motion for a new trial following the first trial on this case the Honorable Daniel Berschauer, an extremely seasoned trial judge, who following this case retired, made the following comment supporting his decision granting a new trial limited to the issue of damages:

> I also accept responsibility for my ruling regarding insurance. I allowed plaintiff's counsel to ask his client to testify, over objection, to the fact she lacked medical insurance. I did so to allow her to testify about finance charges which she was claiming as additional damages. In

> hindsight, I should have either sustained the objection or at least limited the use of the evidence. What is now clear to me is that the jury may very well have used the evidence of ', poverty,', to enhance their Award of damages. The excessiveness of the damage Award is evidence, in my judgment, that this factor may have played a part in their decision. (CP (Transcript of December 19, 2003 Page 8-9) (Appendix No. 9). (CP 2156-2195).

Following such an oral ruling Judge Berschauer entered Finding of Facts which included Finding of Fact No. 1.10 which provided as follows:

> In addition, during the course of trial evidence was submitted by plaintiff that the plaintiff lacked medical insurance to pay her medical bills, and she had been subject to finance charges. In hindsight the allowance of such evidence was error. The financial condition of the plaintiff is irrelevant.

Yet, despite this clear guidance by Judge Berschauer in **granting a new trial**, at re-trial plaintiff's counsel persisted in trying to get before the jury the fact that Ms. Schmidt lacked medical insurance to pay her slip and fall related medical bills. While plaintiff's counsel argument was slightly different, i.e., that such evidence was relevant to explain the failure to get additional treatment, given the fact that Judge Berschauer had granted a new trial based on the very same type of evidence, is indicative of a reckless approach, and a flagrant desire to interject irrelevant evidence in front of the jury as a calculated effort to stir the jurors' passions and prejudices.

Otherwise, frankly such efforts, particularly given Judge Berschauer's previous admonishments, make very little sense. The fact that plaintiff's counsel was able to confuse and convince a far less seasoned trial judge ascribe to his arguments, does not detract from the fact that plaintiff's counsel surely must have known that he was at the line with an intent to cross it. Oddly, at the commencement of trial, plaintiff's counsel argued with the defense's motion in limine, precluding insurance evidence or pleas of poverty. Based on such an argument, the Trial Court entered an Order in Limine, excluding such evidence (CP) (RP 8/20/10, p. 51). Despite such argument thereafter, plaintiff's counsel spent a good portion of trial concerning the Court to change her **argued ruling**. Such behavior is puzzling. (RP 8/20/10, p. 42)

Frankly, the Trial Court's approach to this issue was erratic, inconsistent and at the end of the day made very little sense given the fact that the Court, despite previously admitting such evidence of Ms. Schmidt's lack of insurance, suggesting a poor financial condition, i.e., a plea of poverty, nevertheless instructed the jury in Court's Instruction No. 5 that "**whether or not a party has insurance**, or any other source of recovery available, has no bearing on any issue that you Must decide ...". (Emphasis Added). The instruction itself is not limited to either the plaintiff or defendant or simply to liability insurance. Thus,

under the terms of the court's own instruction, Ms. Schmidt's lack of healthcare coverage, was not a proper consideration for the jury. Thus, any argument on the part of Mr. Bridges in his closing regarding her lack of insurance, was directly against the Court's own instructions.

As it is, Respondent Schmidt's crabbed efforts to try to distinguish away case law and/or to compartmentalize it simply should be rejected. For all intents and purposes the case of *Nollmeyer v. Tacoma Rail and Power Company*, 95 Wn. 595, 164 P. 229 (1917) is directly on point. The holding of the *Nollmeyer* case at its very essence, is that a plaintiff in a personal injury action, cannot explain away his failure to follow through with treatment recommendations based on the lack of financial resources. Although the *Nollmeyer* case the testimony elicited was not that of a "lack of insurance", as a practical matter, what occurred herein and what occurred in *Nollmeyer* are simply indistinguishable. The sole reason Ms. Schmidt was indicating that she "lacked insurance" as an explanation for her failure to follow up with recommended treatment, is nothing more than a roundabout way of saying, "I couldn't afford it". Further as stated in the case of *Cramer v. Van Parys*, 7 Wn. App. 584, 593, 500 P.2d 1255 (1972) is that "Evidence of the financial circumstances of the parties to an action [are] ordinarily immaterial and irrelevant".

It is noted that Respondent Schmidt cannot point to a single case, where the ability to afford medical care was ever admitted over an objection that it constitutes an impermissible "plea of poverty" and an inappropriate interjection of a party's financial circumstances into the case. The *Ma'ele v. Arrington*, 111 Wn. App. 557, 565, 45 P.3d 557 (2002) case holds no different, and any discussions in *Ma'ele* that such evidence might be used to explain away the failure to seek treatment is pure **dicta**.

Clearly Respondent Schmidt misapprehends Mr. Coogan's position on this issue. It is Mr. Coogan's position that in this case the court should articulate a "bright line rule" similar to that applicable to "collateral source" evidence and broadly hold that such evidence cannot be utilized in a personal injury action for any purposes. See, *Cox v. Spangler*, 141 Wn. 2d 431, 439-40, 5 P.3d 1265 (2000); see also, *Johnson v. Weyerhaeuser, Co.*, 134 Wn. 2d 795, 798, 953 P.2d 800 (1998). As discussed in the *Johnson* opinion the collateral source rule bars evidence regarding the receipt of the collateral sources, even if such evidence might have some relevancy to issues in the case, such as whether or not a party is a "malingerer". The same should be true with respect a party's lack of insurance and/or poverty as an excuse for failing to appropriately follow up on recommended medical care.

The reason why such a "bright line rule" should be articulated, is that even if such information may have some relevancy with regard to explaining why medical care was not sought, its prejudicial impact far outweighs its probative value. See, ER 403. This is particularly compounded by the fact that such evidence is clearly such an appeal for pity that by its very nature, is an appeal to the jury to decide the case based not upon its facts, but upon "passion and prejudice". There are certain categories of evidence, where almost as a matter of law, the prejudicial impact of such evidence far outweighs its limited probative value, even though it can be said that the evidence is "relevant". See, *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 230 P.3d 583 (2010) (plaintiff's immigration status even though minimally relevant to lost future earnings); *In re Detention of Pouncy*, 168 Wn. 2d 382, 229 P.3d 678 (2010) (a fact expert's methodology had previously been determined to be generally unaccepted in relevant scientific immunity and other proceeding); *Kappelman v. Lutz,* 167 Wn. 2d 1, 217 P.3d 286 (2009) (lack of motorcycle endorsement and license was outweighed by its danger of unfair prejudice); *Himango v. Primetime Broadcasting, Inc.,* 47 Wn. App. 259, 266, 680 P.2d 432 (1984) (No an abuse of discretion to exclude evidence of prior consensual extramarital affair because it did not have probative value in defamation action and only slight probative value as evidence relating to damages,

which was substantially outweighed by his potential for prejudice); and see also, *Kirk v. WSU*, 109 Wn. 2d 448, 746 P.2d 285 (1987) (evidence of abortion although potentially relevant to emotional damages, excludible due to unfair prejudicial impact).

Here, Ms. Schmidt's plea of poverty, lack of insurance and interjection of her financial condition into the case, raises a whole host of collateral issues that had no place within this case. By its very nature it was a plea of poverty, and truly was interjected for no other purposes. This is particularly so given the fact that although Ms. Schmidt was indicating that in late 1996 she could no longer afford to seek treatment for her accident-related slip and falls, by April, 1997 she was able to afford treatment with a whole host of other providers relating to her April 1, 1997 motor vehicle accident. Thus, the probative value of such information was at best exceptionally nominal.

As such, it is urged that this court pronounce a "bright-line rule" precluding the interjection of such evidence for any purposes, even if the plaintiff, or for that matter, the defendant raises issues with regard to cessation and/or gaps in medical treatment.

The remainder of the contentions regarding these issues is adequately addressed within Mr. Coogan's opening brief.

D. Plaintiff's Counsel Had No Business Interjecting Himself into the Subpoena Issued by Defendant to Witness McMonagle

In a slightly different context the First Circuit Court of Appeals made an observation which is particularly apropos to the circumstances surrounding Mr. Coogan's efforts to procure Mr. McMonagle's testimony at trial and plaintiff's counsel's involvement in that process, "What an actor says is simply not conclusive on a state-of-mind issue, a contrary state of mind 'may be inferred from what he does and from the factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended.'" See, *Anthony v. Sundlun*, 952 F.2d 603, 606 (1st Circuit 1991). In other words, in assessing Mr. Bridges' conduct on this issue, it is suggested that the court look to what he actually did and not his explanations. While one generally eschews trying to "make a case" against opposing counsel, it is noted that what occurred here with respect to Mr. McMonagle's subpoena, is extremely troubling. Once one cuts through the histrionics and efforts at manufacturing a "soap opera" the undisputed facts establish that Mr. McMonagle was duly served with a subpoena to attend trial by defendant's counsel. (CP 1067-1106). Mr. McMonagle was an important witness in this case because during the operative time frame he was Ms. Schmidt's fiancé and would have important information regarding any adverse effect she may have suffered

as a byproduct of the 1995 slip and fall as well as the April 1, 1997 automobile accident in which she was driving one of Mr. McMonagle's cars.[7] (RP 8/20/10, p. 7-8) (RP 10/1/10, p. 9). If one examines actually "what happened" it simply does not pass "the smell test". Despite the fact that Mr. McMonagle had been duly served by defense counsel, on August 20, 2010 Mr. Bridges marched into court with a pre--prepared "Notice Regarding Unavailability of Witness and Use of Trial Transcript" which included a declaration by Mr. McMonagle drafted on plaintiff's counsel's pleading paper. (RP 8/20/10, p. 3) (CP 997-1030). Within a declaration Mr. McMonagle took the erroneous position that he somehow was entitled to have his testimony subject to videotape preservation and/or that because he was not served with a witness fee and mileage that he did not have to honor the subpoena. As explained in Appellant's Opening Brief, such a proposition is untrue.

Armed with such information, Mr. Bridges, who while at the same time indicating that Mr. McMonagle would be "an important witness for

[7] Whether or not Mr. McMonagle intended to be "on his honeymoon" at the time of trial, is simply irrelevant. He was duly subpoenaed and is an officer of the Court, in addition, it is simply untrue that the sailing trip which occurred at time of trial, was Mr. McMonagle's "honeymoon". He had already taken a trip with his new spouse, right after his wedding. (RP 10/1/10, p. 5). and was taking a subsequent sailing trip with her as well as with other friends. The Court can take notice that typically newly married couples do not take their honeymoons while accompanied with others. Mr. McMonagle, is a lottery winner and has not worked for years. The fact that he had a planned sailing trip, was not a particularly novel event in his life, since he owned a sailboat which no doubt he routinely and regularly used. (CP 1682-1703) (CP 1853-1855) (1936-1961).

the plaintiff's case", nevertheless argued that he should be allowed to use Mr. McMonagle's prior trial testimony due to his "unavailability", which apparently Mr. Bridges was facilitating by sponsoring Mr. McMonagle's legally and factually erroneous position before the Trial Court.[8] Mr. Bridges, who alleged he was not representing McMonagle's interests went so far as to actually move to quash Mr. McMonagle's subpoena, as part of his scheme to limited Mr. McMonagle's listening to his **very limited** testimony in the first trial. (RP 8/20/11, p. 6).

Ultimately, the Trial Court rejected the plaintiff's rather sophomoric efforts to utilize Mr. McMonagle's prior testimony under the terms of ER 804 given the fact that the plaintiff herself had failed to issue a trial subpoena to Mr. McMonagle, which naturally would be a prerequisite under that particular rule. (RP 252-254) (CP 1704-1714). Further, it is noted that Mr. McMonagle's trial testimony occurred in the previous trial where the evidence relating to damages was substantially

[8] Despite the fact that Mr. Bridges was contending before the Trial Court that Mr. McMonagle was a important witness to the plaintiff's case, at the same time he admitted that the plaintiff had made no effort to subpoena Mr. McMonagle, and did nothing to aid the defense's efforts to enforce the terms of the defense subpoena. It is noted that during the course of trial, defense counsel was willing to agree to permit Mr. McMonagle to testify telephonically and/or by way of Skype, but Mr. Bridges flatly refused to stipulate to such electronically generated testimony, which used to be the requirements under CR 43. (RP 10/1/10, p. 14-15).See, *Kinsman v. Englander*, 140 Wn. App. 835, 844, 167 P.3d 622 (2007) (In a civil case it was held that absent authorization of telephonic testimony by statute or court rule, telephonic testimony is permitted in civil proceedings only if both parties consent). Ironically, CR 43(a) was amended effective September 1, 2010 to permit telephonic and/or video conferencing testimony at the discretion of the trial court. Unfortunately that amendment which became effective September 1, 2010 came too late for purposes of trial of this case.

limited in limine by Judge Berschauer. In that case, Judge Berschauer precluded any testimony regarding the subsequent April 1, 1997 automobile accident, and Mr. Coogan did not have available to him other healthcare records relating to Ms. Schmidt, a number of which did not exist at the time of the first trial in 2003. Thus Mr. McMonagle's testimony, and the evidence, would have been dramatically different and far broader than which had previously been provided in the first trial. By aiding Mr. McMonagle's non-attendance at the second trial, and if the Trial Court had permitted use of Mr. McMonagle's prior testimony, the plaintiff would have been aided in maintaining the false position that the 1995 slip and fall was the source of all her problems, and would have denied the defense the opportunity to explore the state of Ms. Schmidt's health, and activity level generally with Mr. McMonagle and specifically as it related to the April 1, 1997 accident when Ms. Schmidt wrecked his car.

In sum, it is clear that plaintiff's counsel clearly has "boundary issues", and it would hard to imagine that such efforts to facilitate the nonattendance of a critical witness in a civil case would not constitute misconduct of a prevailing party under the terms of CR 59(a)(2) or at least

a "irregularity in the proceeding of ... an adverse party within the meaning of CR 59(a)(1). Frankly the whole episode is and was rather bizarre.[9]

Finally on this issue it is noted that once again Mr. Bridges has invoked "CR 11" with respect to Mr. Coogan's contentions. It is noted that such invocation of CR 11, without even a scintilla of briefing regarding its application to appellate proceedings or the specific facts of this case, in and of itself is frivolous. See, *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 829 P.2d 1099 (1992) (A frivolous invocation of CR 11 in and of itself can be violative of CR 11). The Trial Court's utilization of Mr. McMonagle's absence as a justification for the calling of surprise witness Tina Edwards is already adequately addressed in Appellant's Opening Brief and the lack of propriety of such, tends to speak for itself.

E. Ms. Schmidt's Discovery Responses and Failure to Disclose Her Prior Criminal History Are Part and Panel of the Trial Court's Cumulative Errors Warranting the Grant of a New Trial

These issues are fully and adequately briefed in Appellant's Opening Brief. It is noted however that Ms. Schmidt's efforts to avoid the admission of her prior theft condition by fabricating a story that

[9] As explained in previous pleadings before this court prior to filing of appellant's opening brief, the reason why issues relating to Mr. Coogan's post-trial motion to have Mr. McMonagle held in contempt, were not raised herein, is because of the need to keep appellant's opening brief at a manageable length, and because any abuse of discretion on the Trial Court's part in failing to hold Mr. McMonagle in contempt, will not relieve Mr. Coogan from the excessive verdict and judgment in this case.

Mr. Barcus provided her advice with respect to such conviction, so strains credibility and is such an abrasive fabrication that it simply should be disregarded by the Appellate Court. As Ms. Schmidt apparently desires to point out, Mr. Coogan and Mr. Barcus have been friends for years. Would anyone seriously believe, that he would represent or advise Ms. Schmidt, on a felony theft conviction, where the victim of her crime was her former employer, when his friend, Mr. Coogan, was thereafter employing Ms. Schmidt as a "bookkeeper". Would anybody in their right mind seriously believe that such would occur? Who is the Court going to believe, a convicted felon who steals from her employer, and who falsely answers interrogatories, or a well-respected member of our legal community? (CP 404-514).

F. The Trial Court Abused Its Discretion by Failing to Grant a New Trial Due to Jury Misconduct

This matter is already adequately briefed in the Appellant's Opening Brief, save for addressing the newly minted case issued by this Court in *McCoy v. Kent Nursery, Inc.,* 163 Wn. App. 744, 260 P.3d 967 (2011). It is noted ultimately the *McCoy* case stands for the proposition that the party who is granted a new trial because of juror misconduct as it related to voir dire must adequately support such a request based on matters within the record. In *McCoy*, this Court made it abundantly clear

that in a case where voir dire examination was not recorded, there needed far clearer proof of evasive or false juror statements during voir dire, than was presented within that case. Additionally, the *McCoy* case dealt with an entirely different set of allegations as it related to juror misconduct. The grave man of the claim in *McCoy,* was that the jurors brought life-experience-type issues into the jury room, that were not appropriately disclosed during voir dire examination. Such matters are not at issue in this case.

Rather, Appellant Coogan, is contending that the jurors engaged in misconduct in this case by inappropriately taking extrinsic evidence into consideration, and resting its decision on such extrinsic information. Those are entirely different issues than those which were addressed in the *McCoy* opinion.

III. Mr. Coogan's Response to Cross-Appeal

A. General Damages Are Not Available In a Legal Malpractice Case For Any Emotional Distress Suffered As A Byproduct of the Malpractice Itself.

On this issue, the Cross-Appellant's characterization that it is an issue involving the failure of the Trial Court to instruct on this issue is inaccurate. Such an issue has been resolved pre-trial by way of the Trial Court's denial of Plaintiff's Motion for Summary Judgment, which

essentially sought permission to pursue such damages, and when the Trial Court refused to permit Ms. Schmidt to some ten years after initial filing, to amend her Complaint to include other tort related claims, which might have allowed Ms. Schmidt to achieve an award of general damages for the events surrounding the malpractice, and not for the injuries suffered in the underlying slip and fall. Additionally, the Trial Court, by way of granting of Defendant's Motion in Limines excluded any proof that arguably would relate to Ms. Schmidt's "emotional distress damages because of the malpractice".

To the extent that Cross-Respondent is contending that it is a matter of an "instructional issue", it is noted that such issue should be rejected for failing to assign specific error to any instructions that the Court failed to give. See, RAP 10.3(g). Additionally, any instruction of which Cross-Appellant contends was either inappropriately given or not given, should have been included with the appendix to Appellants to Respondent's Opening Brief, under the terms of RAP 10.4(c).

Nevertheless, it is noted that despite the somewhat misleading presentation of the issue by Cross-Appellant, for the sake of discussion, it will be conceded that the issue of general damages for malpractice is appropriately before this Court. (CP 2156-2195). As shown below, under the well-established laws of the State of Washington, one cannot receive

general damages for the act of malpractice in and of itself, and such general damages are not available to accept as they otherwise would be an element of damage within the underlying claim. (Assuming proof of collectability).

In order to resolve this issue, the trial court need go no further than the Supreme Court opinion in *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), wherein the Supreme Court found that it was inappropriate in a legal malpractice case, involving personal injury, to deduct from the award of damages the contingency fee that the negligent lawyer otherwise would have earned had he successfully pursued the claim. The Supreme Court declined to allow for the deduction of the hypothetical contingency fee, adopting Division I's rationale that it would otherwise result in the client having to pay twice for the same services, i.e., not only would there be a deduction for the contingency fee that would have been earned, had the defendant attorney not acted negligently, but also likely a contingency fee would have to be paid to the lawyer pursuing the malpractice claim.

When reaching such a result, the Court made no reference to the notion that there could be a general damages award available for the malpractice per se. In other words, as the measure of damages in a legal malpractice claim involving personal injury is the value of the underlying personal injury claim, there could be a substantial rationale for not

deducting the negligent attorney's contingent fee, because it would create a burdensome double reduction for attorney's fees discouraging claims on behalf of persons who were injured by a negligent lawyer. Such a rationale and/or calculus would be entirely different, if in fact the client could acquire an award of general damages for the malpractice, from which a contingency could be paid to the lawyer pursuing the malpractice claim, thus not resulting in a substantial reduction of the award otherwise available to the client. In other words, if general damages were available for "malpractice" the *Shoemake v. Ferrer*, opinion simply would not make sense, nor would the Supreme Court have ignored the availability of such general damages in its analysis.

Further, to reach such a result would eviscerate the notion of "proximate cause" applicable to legal malpractice cases. As explained in *Aubin v. Barton*, 123 Wn.App 592, 606-607, 98 P.3d 126 (2004), the usual principles of proof and causation in a legal malpractice action do not differ from ordinary negligence:

> *Where it is alleged that an attorney committed malpractice in the course of litigation, the trial court in the malpractice claim retried, or tried for the first time, the client's cause of action that the client contends was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have faired better but for the alleged mishandling. Thus, to prove causation, the client must show that the outcome*

> *of the underlying litigation would have been more favorable, but for the attorney's negligence. The proof typically requires "a trial within a trial."* (Citations omitted).

Stated another way, in a malpractice setting, the plaintiff must demonstrate that he or she would have prevailed, or at least would have achieved a better result had the attorney not been negligent. See, *Estep v. Hamilton*, 148 Wn.App 246, 210 P.3d 331 (2009). Typically, that means it is the burden on the plaintiff to establish in order to prove damages in a legal malpractice case, what they would have acquired had the case been appropriately handled. In this context, obviously had Mr. Coogan performed without negligence, what Ms. Schmidt would have acquired was a judgment which provided a determination of the valuation of the underlying personal injury she suffered in the slip and fall accident. There is no case law nor authority indicating to the contrary.

In *Lavigne v. Chase, Haskell, Hayes and Kalamon, P.S.*, 112 Wn.App 677, 550 P.3d 306 (2002), the appellate court explored damages in legal malpractice cases:

> *The measure of damages for legal malpractice the amount of loss actually sustained as a proximately result of the attorney's conduct. As the* Matson *court further reasoned: "courts consider the collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: it would be inequitable for the plaintiff to be able to*

> *obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party."...* (Citations omitted).

In this case, essentially Ms. Schmidt is seeking to collect from Mr. Coogan an amount of money she could otherwise not have collected from the underlying tortfeasor, the Grocery Outlet defendant. In other words, she is seeking a windfall in that she is seeking a judgment "which is greater than the judgment the plaintiff could have collected from the third party." *Id.*

As the *Lavigne* case further indicates, the reason why "collectability" is an element of a legal malpractice plaintiff's case is to prevent the acquisition of such a windfall:

> *The majority of jurisdictions require the plaintiff to prove collectability. The policy basis for this approach is to avoid awarding the aggrieved more than he or she would have recovered had the attorney not been negligent." As one of these courts reasoned "in a malpractice action, a plaintiff's 'actual injury' is* ***measured by the amount of money she would have actually collected*** *had her attorney not been negligent." Klump v. Duffus,* 71 F.3d 1368, 1374 (7th Cir. 1995). (Emphasis added). *Hypothetical damages beyond what the plaintiff would have genuinely collected from the judgment creditor "are not a legitimate portion of her 'actual injury' and awarding her damages would result in a windfall. Stated another way, these jurisdictions tend to view collectability as a component of the*

plaintiff's prima facie case." (Citations partially omitted; emphasis original).

Thus, it can be reasonably stated under Washington Law Ms. Schmidt's damages are limited to her "actual injuries", i.e., what she would have acquired in her claim against the Grocery Outlet and no more.

Further, it is noted that despite Ms. Schmidt's policy arguments, it is suggested that if the Supreme Court in Washington had intended that general damages be available for malpractice, it would have clearly said so in the number of legal malpractice cases that have been decided within the appellate courts in the State of Washington. See, *Daugert v. Pappas,* 104 Wn. 2d 254, 257, 704 P.2d 600(1985). Naturally, anyone who has had their lawyer fail to perform adequately and negligently would be upset by the lawyer's conduct. Nevertheless, our courts have consistently held that the measure of damages is limited by case within a case principles, and thus, all of the damages that are available to a plaintiff, particularly in a personal injury claim, is the value of the underlying claim itself, no more and no less.

While Plaintiff in this matter may be making arguments that have some superficial level of appeal, what is being suggested by the Plaintiff is clearly not the law within the State of Washington. There is no legal support for the Plaintiff's contention that emotional distress damages are

available for "malpractice" and the law in the State of Washington, though perhaps not clear, generally indicates to the exact contrary.

Further, efforts to analogize medical malpractice to "insurance bad faith cases" have previously been rejected by our appellate courts. See, *Kommavongsa v. Saskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003), and *Kim v. O'Sullivan*, 133 Wn.App 557, 137 P.3d 61 (2006). In *Kommavongsa*, the Supreme Court held that the assignment of an attorney malpractice claim to an opposing party as a party of a settlement agreement, violates public policy for the reasons state therein. In *Kim v. O'Sullivan,* the parties tried to avoid the public policy announced in *Kommavongsa* by acquiring as part of a personal injury settlement agreement that the client bring the legal malpractice action in order to fund an underlying settlement. Under the terms of the settlement agreement, despite the fact that the client was the putative plaintiff in the legal malpractice action, the opposing party in the underlying case maintained the right to control the malpractice litigation and to approve any and all settlements of that litigation.

Based on the public policy principles set forth in the *Kommavongsa* case, the Court of Appeals in *Kim* rejected such efforts to evade the rule that attorney malpractice claims cannot be assigned to an opposing party.

In reaching such a result, the Court of Appeals in *Kim*, rejected the application of insurance bad faith principles, which otherwise would have allowed the underlying stipulated judgment to be "presumptive damages." Rejecting such an analogy, the Appellate Court reasoned that not only would such efforts violate *Kommavongsa's* prohibition against assignment of claims, but would result in a windfall to the underlying plaintiffs, who were simply trying to replace the underlying policy limits for whatever policy limits that the negligent attorney carried as malpractice insurance coverages.

In other words, the appellate court, at least in one instance, has already rejected any analogy or comparisons of insurance bad faith claims to attorney malpractice claims.

In any event, there is no support for the proposition that insurance bad faith damage principles have any application in the attorney malpractice context. In fact, there are reasons why such an analogy should not be applied; including that it would do nothing more than to provide a windfall to the plaintiff above and beyond their actual damages.

There is no authority for the position taken by the Plaintiff within her cross-appeal and as such, her contentions should be rejected.

B. The Trial Court Did Not Abuse Her Discretion in Failing to Permit Cross-Appellant to Amend Her Complaint Ten Years After The Fact To Include Additional Claims.

The Appellate Court reviews the grant or denial of a Plaintiff's Motion for Leave to Amend the Complaint under an abuse of discretion standard. See, *McDonald v. State Farm Fire & Casualty Insurance Company,* 119 Wn. 2d 724, 737, 837 P.2d 1000 (1992). Here, clearly the Trial Court did not abuse her discretion by failing to permit Cross-Appellant Schmidt to amend her Complaint, some ten years after its original filing and some eleven to fourteen years after the event for which she was attempting to seek damages. (CP 1994-2114).

A motion to amend a pleading is addressed in the sound discretion of the trial court. See, *Kirkham v. Smith*, 106 Wn.App 177, 223 P.3d 10 (2001). The trial court may deny a motion to amend a pleading if it appears that to allow such amendment would work an injustice upon the opposing party. See, *Knight v. Fang*, 32 Wn.2d 217, 201 P.2d 198 (1948). The touchstone for a denial of an amendment of a pleading is the prejudice such amendment would cause the non-moving party. See, *Bunko v. City of Puyallup Civil Service Comm.*, 95 Wn.App 495, 975 P.2d 1055 (1999). A trial court may consider whether pursuit of a new claim would be futile in ruling on a motion to amend a pleading. See, *Shelton v. Azar, Inc.*, 90

Wn.App 923, 954 P.2d 352 (1998). Undue delay, which works a hardship or prejudice on an opposing party, constitutes a sufficient reason for denial of leave to amend. See, *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 399 P.2d 587 (1965). Hardship sufficient to deny a Motion to Amend, include the need to find and disclose new witnesses and experts, reformulate defense strategies and the disruptions of an already set case schedule. See *Murphy Contractors, Inc., v. King County*, 112 Wn. App. 192, 200, 49 P.3d 912 (2002).

To the extent that Cross-Appellant was seeking to amend her Complaint to include the claim for general damages as a result of "the malpractice". Obviously, such an amendment on its face would have been futile because the laws of the State of Washington does not permit such damages. To the extent that Cross-Appellant Schmidt was seeking to amend her Complaint to add additional claims, it is hard to imagine a case where a Trial Court would have been more justified in denying a motion to amend and add additional claims.

First of all, at the time the Motion to Amend was being made, the case before the Trial Court, following an appeal, for a trial limited to the issue of damages. Amendment, following remand, would have substantially expanded the case well beyond that which was remanded to the Trial Court. In addition, it is noted that such an amendment would

have required defendant Coogan to have to engage in discovery with respect to facts that were 11-14 years old, or explore alleged injuries which occurred some 11-14 years prior. It would open a whole new area of inquiry, particularly as it relates to Ms. Schmidt's alleged mental state and emotional injuries. It would have required acquisition of new witnesses, and potentially new experts, which had not been previously contemplated nor disclosed.

Although it is true that the case of Caruso *v. Local #690*, 100 Wn.2d 343, 670 P.2d 240 (1983) sets the outward boundaries of even as much as five or six years after filing of the original complaint for amendment, clearly *Caruso* does not stand for the proposition that an amendment can address facts that occurred some 11 to 14 years prior to the date amendment was sought. This is further compounded by the fact that not only is the Plaintiff seeking amendment to facts that occurred 11 to 14 years ago, but also the fact that this case has already gone through a panoply of appeals, and the case is currently set for trial on extremely limited issues following a remand, and specific directions.

Further, there is not a shred of doubt that the proposed amendment would be "futile." See, *Rogriguez v. Loudeye Corp.*, 144 Wn.App 709, 730, 189 P.3d 168 (2008). In this case, even if all of the factual allegations set forth within Ms. Schmidt's deposition are taken as true,

they do not make a claim of outrage. It has long been recognized that in the employment context, misconduct which rises to the level of "petty insult or trivial indignities" or even employer conduct which could be characterized as crass and boorish "as a matter of law do not exceed 'all possible bounds of decency' measured against an objective standard of reasonableness." See, *Strong v. Terrell*, 147 Wn.App 376, 386, 195 P.3d 977 (2008). See also, *Hope v. Larry's Market*, 108 Wn.App 185, 196-97, 29 P.3d 1268 (2001) (employer conduct which can be characterized as a deliberate and willful intent to injure the employee, is not sufficiently extreme as to be regarded utterly intolerable in a civilized society, which is a necessary element for an outrage claim); *Womack v. Von Rardon*, 133 Wn.App 254, 135 P.3d 542 (2006) (torturing and killing of the Plaintiff's cat, though deplorable, is an insufficient bases for an outrage claim); see also, *Dicomes v. State*, 113 Wn.2d 612, 630-31, 782 P.2d 1002 (1989) (mere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage, even if such actions could be characterized as malicious).

Clearly, if what Ms. Schmidt says is true, at best, Mr. Coogan's behavior was boorish, crass and an unprofessional way for an employer to treat an employee. It is respectfully suggested that is does not reach the

level of outrage as a matter of law thus amendment should be denied as "futile".

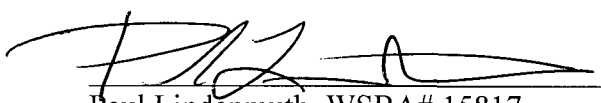
In sum, the proposed amendment, which comes some 11 to 14 years after the event, and after a full trial and the issuance of a number of appellate opinions, and case schedules, simply comes too late. This case is set for trial in July of this year. If the Court was inclined to permit such amendment, it would have substantially expanding the discovery needed, and the case preparation necessary for a trial date which was quickly approaching. Further, it would have placed Mr. Coogan in the position of having to explore factual allegations which were incredibly stale, and where it was likely that memories have faded and a vast amount of the evidence necessary to defend would have been unavailable.

Further, and dispositively, any amendment to include an outrage claim under these facts would have been futile. While it is agreed that Mr. Coogan's behavior, if it was as alleged, was crass, boorish and generally inappropriate, it does not rise to the level of atrociousness need for a claim of outrage under the law of the State of Washington. Thus, for that reason above, Ms. Schmidt's Motion to Amend was apparently denied.

CONCLUSION

For the reasons stated in Appellant's Opening Brief, the judgment in this case should be reversed and this case remanded for dismissal. Alternatively, there are ample grounds for ordering a new trial. Ms. Schmidt's cross-appeal should be denied.

DATED this14th day of December, 2011.



Paul Lindenmuth, WSBA# 15817
Attorney for Appellants/Cross-Respondents Coogan

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

TERESA SCHMIDT, Plaintiff, vs. TIMOTHY P. and DEBORAH COOGAN, and the marital community comprised thereof; and THE LAW OFFICES OF TIMOTHY PATRICK COOGAN and all partners thereof, Defendant.	NO. 00-2-12941-1 PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

A cited and un-cited set of Plaintiff's Proposed Jury Instructions is being provided to both the court and defendant's counsel.

McGAUGHEY BRIDGES DUNLAP, PLLC

8/18/2010

By: _____
Dan'L W. Bridges, WSBA #24179
Attorney for plaintiff

ORIGINAL

McGAUGHEY BRIDGES DUNLAP PLLC
325-118th Avenue Southeast Suite 209
Bellevue Washington 98005-3539
(425) 462-4000
(425) 637-9638 Facsimile

INSTRUCTION NO. ____

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

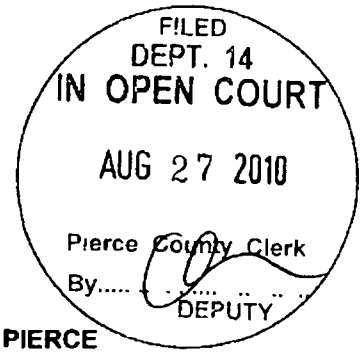
WPI 15.01

Plaintiff's Proposed Instruction No. 3A

Appendix 1

Appendix 2

ORIGINAL



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

TERESA SCHMIDT, Plaintiff, vs. TIMOTHY P COOGAN ET UX, Defendants	Cause No 00-2-12941-1

COURT'S INSTRUCTIONS TO THE JURY

DATED this 26th day of August, 2010.

Carol Murphy

JUDGE CAROL MURPHY

Instruction No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about

the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

Instruction No. 2

The evidence that has been presented to you may be either direct or circumstantial.

The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Instruction No. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Instruction No. 4

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

Instruction No. 5

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide this case.

Instruction No. 6

The plaintiff, Teresa Schmidt, claims that defendants, Timothy Coogan and the Law Offices of Timothy Patrick Coogan, entered into an attorney-client relationship and agreed to represent her in a lawsuit arising out of her sustaining personal injuries when she fell at a Tacoma, Washington grocery store on December 23, 1995. Plaintiff claims defendants were negligent in failing to timely sue the correct owners of the grocery store where she fell which resulted in her claims against the grocery store being barred by the statute of limitations.

It has already been determined that defendants Timothy Patrick Coogan and the Law Offices of Timothy Patrick Coogan were negligent in failing to timely sue the correct owners of the grocery store. It has already been determined that the grocery store was negligent and at fault for plaintiff's personal injury when she fell. As such, defendants Timothy Patrick Coogan and the Law Offices of Timothy Patrick Coogan are liable for the full extent of plaintiff's injuries arising out of her personal injury sustained on December 23, 1995.

This case is presented for the jury to determine the amount of damages plaintiff sustained that were proximately caused by plaintiff's fall in the Grocery Outlet Store on December 23, 1995.

Instruction No. 7

It is the duty of the court to instruct you as to the measure of damages.

You must first determine the amount of money required to reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by her falling on December 23, 1995, at the Grocery Outlet.

You should consider the following past economic damages elements:

The reasonable value of necessary medical care, treatment and services received to the present time. That amount agreed by the parties is **$3,733.16.**

In addition you should consider the following noneconomic damages elements:

The disability, pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future, the nature and extent of the injuries, emotional distress, and the loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Instruction No. 8

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Instruction No. 9

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Instruction No. 10

If you find that:

(1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and

(2) because of this occurrence the pre-existing condition was lighted up or made active,

then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

Instruction No. 11

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided

in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding.

The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the judicial assistant that you have reached a verdict. The judicial assistant will bring you back into court where your verdict will be announced.

Appendix 3

BE IT REMEMBERED, that on Thursday, the 13th day of February, 2003, at 3:44 p.m., at the address of Sloan, Bobrick & Oldfield, 7610-40th Street West, University Place, Washington, before H. Milton Vance, a Certified Court Reporter and Notary Public in and for the State of Washington, appeared ALAN BROBECK, M.D., the witness herein;

WHEREUPON, the following proceedings were had and done, to wit:

(Exhibits 1 through 7 were marked prior to commencement of proceedings.)

* * * * *

ALAN BROBECK, M.D., having been first duly sworn by the Notary, testified as follows:

E X A M I N A T I O N

BY MR. BRIDGES:

Q Dr. Brobeck, my name is Dan Bridges. And as the court reporter just identified, we're here today to take your testimony to preserve for trial. So the questions I'm giving you and the answers you are saying are going to be played in front of the jury, so I'd like you to consider this as though you were sitting in a courtroom looking at the jury and giving

your responses.

Let me ask you first, sir, although the court reporter identified you, I need you to yourself identify who are you please.

A Alan George Brobeck.

Q Dr. Brobeck --

MR. JENSEN: Excuse me a second, Counsel. Do you want to reserve objections during this testimony or do you want me to make my objections on the record now while going through this?

MR. BRIDGES: Well, I think you need to preserve your objection. I think it would be appropriate, though, that it is a nonspeaking objection, and saying "relevance" or "hearsay" or what have you would preserve your ability to make the argument later.

MR. JENSEN: That was my question. We could do it -- we could reserve objections and then redact the testimony at the time of trial if the deposition is used, or we could -- to make it more smoothly that way -- or do you want -- if you want me to make my objections during the course of his testimony, I can do that too, but it might be smoother if we didn't do that.

MR. BRIDGES: I appreciate the offer. But if there's an objection, I need the opportunity to cure

the problem. So -- but thank you for the offer.

BY MR. BRIDGES: (Continuing)

Q Dr. Brobeck, rather than me playing 20 questions and trying to draw out of you your history, would you please simply explain to the jury, perhaps give them a 60 second overview of your professional background beginning with medical school and to the present.

A I attended the University of Washington Medical School, graduating in 1964. I then had a year's internship in Denver, Colorado. I then had a year's general surgical residency at Fort Sill, Oklahoma. I then had a three-year orthopedic surgical residency at Brooke General Hospital, San Antonio, Texas; followed by a one-year fellowship in children's orthopedic surgery at Shriners Hospital for Crippled Children, Los Angeles. I was the chief of orthopedic surgery at Darnell Army Hospital, Fort Hood, Texas until I entered private practice in 1972 in the North King County, South Snohomish County area. I was in private practice until 1995 when I semiretired.

Since retiring, I do independent medical evaluations approximately six days a month.

I have also done third-world medical work in the following countries: Russia, Belarus, Ukraine, Haiti, Cuba, and Chile.

I'm currently also the medical director of a skilled nursing rehabilitation facility.

Q Doctor, I apologize if this sounds like a really basic question, and many of the members of the jury may already know this, but you mentioned you were an orthopedic surgeon. Could you please explain to the jury what area of practice an orthopedic surgeon is as opposed to example a general practitioner.

A Orthopedic surgery is that branch of medicine that deals with the musculoskeletal system. In layman's terms, the arms, the legs, neck and back including injuries to those areas, diseases of those areas, surgery of those areas, and reconstructive surgery of those areas.

Q Doctor, in the context of your practice, both within the army and in private practice, have you had an opportunity to provide clinical medical treatment to individuals with neck and back injuries?

A Yes.

Q And have some of those injuries involved people slipping and falling?

A Yes.

Q Have you had an opportunity to conduct a medical record review and a physical examination of Ms. Teresa Schmidt?

A Yes.
Q What I'd like to do just to provide the jury and yourself a road map is to walk you through what you did in terms of providing an evaluation in terms of medical record review and a physical evaluation in general terms, and then we're going to talk specifically about Ms. Schmidt and your findings if that's okay with you.
A That's fine.
Q Let me ask you first: How did Ms. Schmidt come to be referred to you?
A At the time of the independent medical evaluation, I honestly didn't know. I knew it was an attorney. We did not have a cover letter. The records only arrived 30 minutes before the evaluation. So all I knew is I was doing a legal evaluation for an attorney. I did not know who or any of the details.
Q Do you now know that I referred Ms. Schmidt to you?
A Yes.
Q At the time of the examination then did you know whether you were being asked to examine her on her behalf or on behalf of the person who she was bringing a claim against?
A No.
Q I'm not trying to imply that if you knew the answer to

that question that your review would have been any less objective.

But let me ask you flatly: In the context of performing your evaluation did you make it objectively and without regard to how the end result would either benefit or be adverse to any person?

A I did.

Q And, Doctor, have you conducted that type of examination before?

A Yes.

Q In the course of conducting your examination did you review medical records?

A I did.

Q Do you have -- and you may look at your, of course, report if you -- if it would be of assistance. Do you have a recollection as to the medical records you reviewed?

A Yes. I reviewed the records supplied by counsel including a report of Donald R. Rose, M.D., a radiologist, concerning an MRI done March 11, '96; records of Joseph D. Sueno, M.D., concerning nerve conduction studies done; records of G. Michael Wiese, M.D., neurosurgeon, April 15, '96, when he evaluated the claimant; also apparently Dr. Betteridge on referral from a Dr. McNaughton; and also records of

Gerald Coleman, physical therapist; also records of Justin Lee, chiropractic physician who apparently evaluated the claimant April 16, '97; the Office of Robert Klein, M.D.; physical therapy records from Custer Physical Therapy; a lumbar MRI report interpreted by Robert Livingston, M.D., April 18, '97; multiple handwritten physical progress notes from Custer Physical Therapy; a report of radiologist Dr. W.B. Jackson, M.D., concerning an MRI of the temporomandibular joint; EMG nerve conduction studies performed by Dr. Sueno July 3, 1997; physical therapy records from 1998; again physical therapy records from Mr. Tommervik, October of 1998; Dr. Sueno electrodiagnostic studies performed September 21, '99; a evaluation of Dr. Sueno the same date; MRI of the cervical spine interpreted by Drew Dooch (phonetic), M.D., September 23, '99; and additional records from Mr. Tommervik, physical therapist; and handwritten progress notes from Marse McNaughton, M.D., family practice.

Q Doctor, one thing we were discussing before we began your testimony today were the records of a chiropractor by the name of Leone, and we were unsure whether you had those at the time of your report or not. But I'm going to ask you now: Have you since

had an opportunity to review the records of Dr. Leone?
A I have.
Q In order to save some time — and we can go through these individually if you like -- but I'm going to hand you what has already been marked Exhibits Number 1 through 6.

MR. JENSEN: I don't have any markings on mine.

MR. BRIDGES: Well, I'll identify them for the record.

Exhibit Number 1 are the records of Tacoma Physical Therapy.

MR. JENSEN: Excuse me, I need to see the cover. I don't know what you're looking at.

MR. BRIDGES: Exhibit Number 2 --

MR. JENSEN: Slow down please. (Pause) Okay.

MR. BRIDGES: -- are the records of Tim -- pardon me -- Michael Wiese.

MR. JENSEN: That's Exhibit 2?

MR. BRIDGES: Exhibit Number 3 are the records of Dr. Sueno and Electrodiagnosis Physical Medicine Rehabilitation.

Exhibit Number 4 are the doctors of -- pardon me -- the records of Dr. Leone.

MR. JENSEN: That's the chiropractor?

MR. BRIDGES: Correct.

MR. JENSEN: That's Exhibit 4?

MR. BRIDGES: Exhibit 5 are the records of Tacoma Magnetic Imaging.

And Exhibit Number 6 are the records of Dr. McNaughton.

MR. JENSEN: Thank you.

MR. BRIDGES: You're welcome.

BY MR. BRIDGES: (Continuing)

Q Okay. And again, I invite you to go through these individually if you like. But I'm going to ask you en masse: Have -- are these part of the records you reviewed in the context of evaluating Ms. Schmidt in reaching your opinions?

A Yes, with the exception I'm not sure about the chiropractic records of Dr. Leone. I'm not sure whether they were there or not. I have reviewed those since.

Q Okay.

MR. JENSEN: I'm going to object at this point to any records introduced subsequent to April 1, 1997, unless there can be shown some relevance since it's documented in the court file records that the plaintiff, Ms. Schmidt, was involved in a --

MR. BRIDGES: Counsel, you're now making a very extraneous speaking objection. The objection

"relevance" will preserve the record for you. You can make your argument later. But right now --

MR. JENSEN: I'm making --

MR. BRIDGES: -- you're cluttering up my --

MR. JENSEN: -- the objection based --

MR. BRIDGES: -- videotape and my transcript.

MR. JENSEN: -- on relevance.

MR. BRIDGES: Okay. And I would agree that preserves your objection.

MR. JENSEN: Thank you.

MR. BRIDGES: And you can articulate it later for the judge in greater detail.

I will state, however, that the records that have been identified all predate the 1997 incident you're discussing.

BY MR. BRIDGES: (Continuing)

Q Okay. Doctor, is it reasonable and customary for a physician such as yourself to review the medical records of other health care providers in the evaluation of a patient?

A Yes.

Q And is that something you've done before evaluating Ms. Schmidt?

A Yes.

Q I just want to clarify one thing. Earlier you noted

that the medical records arrived 30 minutes before Ms. Schmidt's exam. That notwithstanding, did you have a chance to review those records in full before you reached your final opinions?

A Yes.

Q Okay. Okay, Doctor, would you please explain to the jury the course of treatment -- actually I'm getting a step ahead of myself.

Let me ask you this: Did Ms. Schmidt provide you a history when she presented to you in terms of a slip and fall she had in 1995?

A She did.

Q And was that history also related in part in the medical records we just identified?

A Yes.

Q Doctor, in terms of your opinions, what is your assumption as to the cause of the 1995 injury? In other words, basically how did it happen?

A The history obtained from the -- Mrs. Schmidt was that she related on December 23, 1995, or possibly 1996 -- she was not sure of the exact date -- she was shopping with her sister in the Grocery Outlet store. There was shampoo she thinks on the floor. She slipped and fell backwards. She broke her fall with her outstretched left arm. She hit her head. She denied

loss of consciousness. However, she noted pain in her left arm.

Q Based on the medical records you reviewed and the history Ms. Schmidt gave you, and again, with the understanding that you're relying on what someone else says in their record, do you make an assumption as to whether Ms. Schmidt had pain in her neck or back preceding the slip and fall in 1995?

A There was no history of preexisting pain in either the neck or the left arm to the best of my knowledge.

Q Okay. Did Ms. Schmidt relate to you -- and also if it would be of assistance, you can weave in history you've discovered from the records. Did she relate to you any pain or discomfort she feels she experienced following the 1995 slip and fall?

A Yes. She related she experienced severe pain and swelling in her neck and dorsal area. The dorsal area refers to the upper back.

Q Okay. Now, Doctor, if you would please, to the extent you feel you're able, can you please explain to the jury this woman's medical course in terms of the treatment she had for the 1995 slip and fall.

A Based on the records but primarily on what she told me also supported by the records, she said she was subsequently treated by a chiropractic physician and

received three months of physical therapy. Apparently there was a leave of absence she took, but that was due to more recent symptoms. But basically she had my understanding is chiropractic care and physical therapy.

Q Do you have an understanding as to whether during that period of time she also followed up with her general practitioner Dr. McNaughton?

A Yes.

Q Did you review and consider reports from Tacoma Magnetic Imaging?

A I did.

Q And the reports are Exhibit Number 5; although, you do also relate the findings in your report, so feel free to refer to whichever record you feel appropriate. Did Ms. Schmidt have an MRI conducted shortly after the slip and fall in December 1995?

MR. JENSEN: Well, I'm going to object. You know, if you allow me, I'll voir dire the witness on this point. It appears to me that page number 3 of Exhibit Number 5 is the results of the MRI that indicates the day of Friday, April 18, 1997. That would have preceded her accident.

MR. BRIDGES: Counsel -- let's go off the record for a second, then you can --

MR. JENSEN: Sure.

(Discussion off record.)

MR. JENSEN: All right. For the record, I'm going to -- counsel for the defense objects to reference to any exhibit as I had stated earlier in the deposition of any examination that took place after April 1st of 1997. It appears that the records in Exhibit 5 are records of an MRI that was taken on April 18, 1997, which was 17 days after her car accident; and therefore, I object to it -- object to any reference to it.

MR. BRIDGES: I'm going to place counsel on notice that I'm going to move for my costs in having to edit the videotape to redact these irrelevant and needless objections. Now --

MR. JENSEN: You can call them needless if you want. You can do whatever you want. But I have to make my record.

MR. BRIDGES: Okay, I'm going to pause for a second so the tape will clear because we're going to have to redact that out.

BY MR. BRIDGES: (Continuing)

Q Okay. Doctor, did you review a MRI report dated March 11, 1996?

A I did.

Q What were the findings of that report?
A Degenerative changes were noted were disc bulging at C4-5, C5-6, and C6-7. The bulges were interpreted by the radiologist as relatively small but, quote, "they were significant given the small AP diameter of the bony canal." So in layman's term there was bulging of disc at three different levels in the cervical spine.
Q Okay. I need to stop us for a second and back up. I -- these are terms you use every day, but the jury may not. So I need us to play Anatomy 101 for a second. Can you please explain to the jury what a disc bulge is.
A Okay. The discs are the substances that -- or the cushions that exist between the vertebral bodies. And with aging and time, they can bulge or degenerate, and we'll see those changes. In this case she had bulging of the disc which would imply degenerative changes within those discs. That starts occurring in all of us at about the age 18.
Q Okay. Taking the specific patient out of the equation for the moment, what is the significance of a disc bulge?
A It just indicates that there's been some degeneration of the discs.
Q I've heard it sometimes said that a person can have

multiple disc bulges and not have any pain because of it and yet --

MR. JENSEN: I'm going to object at the form of the question. Counsel's testifying.

BY MR. BRIDGES: (Continuing)

Q I've heard it said sometimes that a person can have a disc bulge and not have any pain because of it, and yet someone can have a disc bulge and it will cause pain. Have you heard sort -- I'm butchering the phrase, but are you familiar with the concept I'm describing?

A Yes.

Q Why is that? Why can't a person have a disc bulge and have there be no pain?

A Normally -- at least in my opinion when you have a bulging disc -- first of all, if you do MRI's on a hundred people over the age of 30 or 40, a large percentage of them will have disc bulges which are asymptomatic.

Q "Asymptomatic" meaning?

A Meaning they don't cause pain.

Q Thank you.

A If that bulge is such that it irritates a nerve structure such as a nerve, then you will develop pain down the arm or the leg depending on where it's at.

Also sometimes disc degeneration in themselves can cause discomfort. It's a complex scenario that occurs because when -- but when a disc starts degenerating, it narrows down, it throws additional stress on the supporting joints, they become what we call arthritic or show wear and tear, and that also -- that phenomenon can cause arthritic changes within the spine that can cause pain.

Q Mechanically what is the aspect of the process you just described that causes the pain? Is it the impingement of a nerve?

A It can occur from impingement of the nerve. It can occur from the degenerative changes in the supporting structures what we refer to facet joints. If they become arthritic, they can cause pain.

Q Okay. And again, taking Ms. Schmidt out of the equation for the moment, what could be the clinical significance of a small -- I'm going to again butcher the phrase -- but a small spinal canal?

A The spinal canal is the area that's surrounded by bony structure -- in this case in the neck -- through which the nerves go down and then exit to the different areas of the body. The discs sit between the vertebrae, and if you have a small canal, it makes those nerves much more susceptible to pressure

irritation from a bulging disc.

Q Okay. Now, let's put all of this back into the context of Ms. Schmidt. If -- you said the assumption you're making is an asymptomatic pain history before the slip and fall of 1995. And then we have an MRI dated March 11, 1996, with the findings you just described and a subjective complaint of pain. Can you put two and two together for me, explain to the jury what the significance of this finding is in the context of this lady's subjective pain?

A It would be my opinion based on the history that she had degenerative changes within the disc, at least three of them, and they're in her neck area. They were asymptomatic before this injury, but the injury then irritated them, and they then became painful. Whether it's from the disc or the joints or the nerves, it's hard to say.

Q Have you heard the phrase "lit up" before?

A Yes.

Q What does that describe?

A "Lit up" is a term -- a legal term. It's also used by the Department of Labor and Industries. A person can have a preexisting condition that causes no problem, or in medical terms it's asymptomatic. Then they have an injury and start having pain or symptoms from that

injury, and the term is "lit up," in other words, made a condition that was previously without symptoms symptomatic.

Q Based on the history you've described and this radiologic finding we're look at -- looking at, does it seem more likely to you that the slip and fall lit up this condition in Ms. Schmidt?

A In my opinion, that would be a reasonable assumption, yes.

Q And I don't think I've asked you this yet, but to be sure we're clear, would the mechanism that Ms. Schmidt described to you in terms of how she fell be capable of producing that type of injury?

A Yes.

Q Referring back to Exhibits 1 through 6 -- and we can go through them one by one if you like, but I'm going to ask you the question en masse as to all of these exhibits and all the treatment that is demonstrated in there, and based on your review of the records, does it appear to be on a medically more likely than not basis that the treatment memorialized in Exhibits 1 through 6 were medically reasonably necessary for the injuries Ms. Schmidt sustained in the 1995 slip and fall?

A Yes.

Q Generally speaking, Doctor, if a person has as you've described a degenerative condition that is asymptomatic, once it is lit up, does that person become susceptible to additional aggravations as time goes on?

A Yes.

Q Would that same dynamic apply to Ms. Schmidt?

A Yes.

Q Okay, Doctor, to just wrap this up, did you reach any conclusions or diagnoses on a medically more likely than not basis as to the injury Ms. Schmidt sustained due to the 1995 slip and fall in the store?

A I felt that she sustained a cervical/dorsal sprain/strain related to the injury of December 23, 1995, on a more-probable-than-not basis.

Q And would you also add to that the discussion we've been having for the last ten minutes as it relates to the MRI findings?

A Yes.

Q Doctor, the subjective complaints that Ms. Schmidt made to you in your office and as expressed in the medical records, are those consistent with the diagnosis and your findings as we've been discussing for the last 15 minutes?

A Yes.

Q And one last question, Doctor, and maybe -- never believe a lawyer when they say one last question. One last issue. Did you actually physically examine Ms. Schmidt?
A I did.
Q Do you recall about how long your physical examination took?
A You know, I don't time these. Let me explain how we do these exams.
Q Please.
A I usually review the records almost always and dictate my record review before I see the patient. I then go in and take a history from the patient, dictate that in their presence so they can make any additions or corrections. In this case I would then leave the room, ask them to get into a gown where it was appropriate. I would then return with a chaperone and do my physical exam which would probably take 15 to 20 minutes. Then after that, I ask if there's any further questions. If not, out of the patient's presence, I then would dictate my diagnoses and conclusions.
Q Without going into unnecessary detail but the amount necessary to explain to the jury so they have a sense of what happened, can you explain what you did in this

physical examination?

A Yes. I would examine the patient first in the upright position. I would palpate or feel the neck and back. And I do this exam -- when I do one of these things, this is pretty much what I do on every one of them. I would then examine the neck and back for tenderness, muscle spasm. I would then watch the person walk to see what their gait was like. I would then have them walk on their heels and toes to see if there's any weakness in the lower legs. I would then measure with an inclinometer which is really a carpenter's level how far the back and neck moved in all directions, record that. I then -- there's some other tests I do with them standing such as pressing on the neck. That's called foraminal compression. Spurling's testing which is to see if there's a nerve that's irritating the neck. I then would have the patient sit on a table. At that point, I measure the legs' circumferences. I do strength of the legs, all the muscles in the lower legs. Using the sitting position, I will test for reflexes, both upper and lower extremities. I will test for sensation, upper and lower extremities, including perception of cold, vibratory, light touch and pin-prick perception. I will then examine the upper extremities for active

range of motion. I will then measure the upper extremities. I also do other tests such as test for carpal tunnel, irritation of the nerves in the arm, and thoracic outlet syndrome, and -- I think I mentioned I also measure the strength and muscles, all the major muscles groups of the upper extremities.

Q Doctor, were your physical findings and observations of Ms. Schmidt consistent with the subjective complaints she was making to you?

A Yes.

Q And were they consistent with the diagnoses you've explained here today?

A Yes.

Q And one last question. Generally speaking, in terms of a disc bulge -- and again, I apologize because this may seem like an obtuse question. But does a disc bulge heal? Can it go back inside to where it was before?

A Yes. Not -- usually it does not. Usually when it bulges, there would be degenerative changes. But sometimes -- it's hard to explain. But you do an MRI, of course, you realize we're looking -- MRI's like any X-ray or study we're just looking at shadows. But we will see where it looks like a disc is resorbed to some extent. So the bulge can decrease with time.

How often that happens, I don't know.

Q Based on your physical examination of Ms. Schmidt, does it appear that that has happened to her in this case?

A No.

MR. BRIDGES: Thank you, Doctor. That's all the questions that I have.

Counsel may have some.

EXAMINATION

BY MR. JENSEN:

Q Doctor, my name's John Jensen. I'm the attorney for -- one of the attorneys for Timothy Coogan who's the defendant in this case.

I had a couple questions. And maybe counsel wants to follow up after I've asked my questions.

Did you review any records for Ms. Schmidt who is the plaintiff in this case that were generated prior to 12/23 of '95?

A No.

Q So you had no objective review of any medical records that may or may not have indicated the same symptoms prior to the alleged slip and fall on 12/23/95?

A That's correct.

Q So you're relying strictly on what she told you?

A Right. Unless -- I'd have to look at the chiropractic records. It's very conceivable -- sometimes they're hard to decipher what is going on in those records. There may have been some records in there from prior visits; I don't know.

Q Did she relate to you or tell you in any part of her history of any kind of care she was having prior to the alleged slip and fall on December 23, 1995?

MR. BRIDGES: Are you disputing the slip and fall happened, Counsel? You keep saying "alleged." Form of the question.

MR. JENSEN: You can phrase your questions the way you want to.

A I have no record that she told me of any treatment prior to the injury of 1995.

Q So you don't know whether or not -- did you inquire as to whether she had any chiropractic or any kind of other treatment prior to that time?

A I usually do. But it's not recorded, so I can't say for sure whether I did or did not.

Q Okay. Now, what was the date that you conducted your physical exam of the IME on this case?

A July 17, 2001.

Q 2001? Did she relate to you during the course of your examination that she was involved in a motor vehicle

accident on April 1, 1997 --
A Yes.
Q -- a rather serious one?
A Yes.
MR. BRIDGES: Object as to relevance.
Q Well, and -- so your examination of Ms. Schmidt occurred, well, some -- approximately four years after she had that other -- that accident -- that automobile accident?
A Yes.
Q Did you review records that were generated subsequent to the accident -- the motor vehicle accident on April 1, 1997?
A Yes.
Q And did you compare those with the records from -- that were generated as -- after 12/23/95?
A Yes.
Q What records did you review that were generated as a result of her motor vehicle accident?
A Records from Custer Physical -- Custer C-U-S-T-E-R -- Physical Therapy, dated April 17, '97. I believe the motor vehicle accident was April 1, '97. Mr. Tommervik's assessment --
Q I don't want to know the assessment. I just want to know the records that you reviewed.

A I understand. But Mr. Tommervik's assessment, April 17, 1997; a lumbar MRI scan, dated April 18, 1997; handwritten physical therapy progress notes from Custer Physical Therapy; record of W.B. Jackson, M.D., concerning temporomandibular joint MRI; records of Dr. Sueno who performed electrodiagnostic studies July 3, '97; physical therapy records from 1998; records from Dr. Sueno; referral from Dr. Klein; electrodiagnostic studies, left upper extremity; cervical MRI, dated September 23, 1999; multiple records from physical therapy, November 2, 1999; apparently a physical therapy visit with Dr. Tommervik; subsequent notes by Dr. Tommervik; multiple handwritten records including chiropractic records; multiple billings; handwritten progress notes from Marse McNaughton, M.D., family practice.

Q That's about it?

A Yes.

Q Did you -- now, I may have missed it. Did you review something from Dr. Richard Wohns -- W-O-H-N-S? Is that on the list?

A I do have no -- I have no record of that.

Q He's a neurosurgeon?

A Yes.

Q And so did you -- you recall reading any kind of a

impression that Ms. Schmidt was treated conservatively after the MRI scan three months later after the December 1995 accident, that she had improved and had not had any cervical pain for months prior to the MVA, meaning motor vehicle accident?

MR. BRIDGES: I'm going to object as to hearsay, relevance.

MR. JENSEN: I'm asking the doctor if he recalls reading that anywhere in his evaluation.

A No.

MR. BRIDGES: The objection is still hearsay and relevance.

MR. JENSEN: Objection's noted.

BY MR. JENSEN: (Continuing)

Q Do you recall reading anything in the records that you reviewed that indicated that Ms. Schmidt had right carpal tunnel syndrome and left carpal tunnel syndrome, both?

A Yes.

Q And that would be something that probably wasn't generated from that fall on the floor in the supermarket, would you agree?

A I can't agree or disagree. The electrodiagnostic studies of Dr. Sueno showed that after the slip and fall. I can't say if it's related or not.

Q Did you recall reading anything about a congenital stenosis of the C -- cervical vertebrae that you referred to earlier?
A The MRI report which I already testified to alludes to the fact that she has a congenitally small canal.
Q And would you explain to the jury what "congenital" means?
A Meaning it's something the person is born with.
Q As opposed to something that would have been caused from an injury, from trauma?
A Yes.
Q How can you tell if your exam was done in -- did you say June of 2001?
A July of 2001.
Q July 2001? How do you -- how are you able to -- can you objectively sift through the sandbox if you were to determine what injuries may have been caused as the result of a fall in 1995 as opposed to injuries that may have been caused in an automobile accident in 1997? Is there some way to filter through these various symptoms to determine which was caused by which, --

MR. BRIDGES: Relevance.

BY MR. JENSEN: (Continuing)
Q -- if any?

A I have to rely on the medical records.
Q And subjective statements of the patient; is that correct?
A That's correct.
Q Okay. Now, apparently plaintiff's counsel hired you to perform this independent medical exam; is that correct?
A I believe so, yes.
Q What is your hourly rate, Doctor, for conducting exams?
A My hourly rate, I get paid $175 for these exams. I'm an independent contractor for Independent Medical Services. I do not know what they charge. My reimbursement's usually $175 for reviewing the records, the evaluation, completing the records, and my report.
Q So you get a flat rate? And you're working for another outfit? Is that the way it works?
A Yes.
Q And so they pay you $175? You don't know how much your company charges the --
A That's correct.
Q Okay. How much do you charge for your testimony per hour?
A I usually use the same rates as approved by the

Attorney General for the State of Washington for Labor and Industry cases. They have a fixed fee schedule which I go by.

Q And what is that?

A I don't have it with me. I can tell you approximately. It includes portal to portal. And the first hour is three hundred and I think sixty-eight dollars, and then it's broken down to half-hour blocks after that at like a hundred and thirty or forty. That's ballpark. I can't give you the exact figure. But I'd have to look it up.

Q So it's approximately three hundred dollars for the first hour, then a hundred and sixty you said or something like that after that or --

A It's a little more than that. They break it down to half-hour increments after that. But it's three hundred sixty approximately the first hour, and lesser for the second and third hours.

Q Okay. And plaintiff's attorney hired you to come in and testify here today; is that correct

MR. BRIDGES: Form of the question.

A That's correct.

Q Would it have been helpful for you in coming to your conclusions to have reviewed some of Ms. Schmidt's medical records from prior to 12/23/95?

MR. BRIDGES: Relevance and speculation.

A That would depend on what the records contained. I'd have to see the records. Without seeing them, I can't say.

Q Did you review any X-rays or -- you just reviewed the actual reports that were generated by other doctors; is that correct?

A That's correct.

Q You didn't review any of the actual X-rays or MRI's that were taken?

A No.

Q Do you have expertise in reading X-rays and MRI's?

A Yes.

MR. JENSEN: That's all I have. Thank you, Doctor.

EXAMINATION

BY MR. BRIDGES:

Q Doctor, briefly, is it an unaccepted practice to consider a MRI interpretive report from a doctor such as you've done here without reviewing the actual film?

A Yes.

Q And I had a double negative in there.

A And I'm not -- can you rephrase the question?

Q Yeah, I -- I -- I had a double negative in there. I

apologize.

Is that an accepted practice to look at the report and rely on the report, Doctor?

A Yes.

Q Is that something you've done in the past?

A Yes.

Q Last night -- or let me rephrase that. Before last night when we speak on the phone to confirm that this deposition was even going forward today, did you have any idea whether it was the plaintiff or the defendant who had retained you to --

A I had absolutely no idea -- I had no contact with you until you called me last night basically to be sure that was -- deposition was still on. The only contact I had with anybody was a legal assistant, Christina Cramer, who scheduled the deposition. I had no idea whether this was a plaintiff or a defense exam.

Q Okay. A few last questions.

Counsel was asking you questions -- and I want to note for the record that I'm asking this line of questions conditioned on the judge ruling on my relevance objection.

Counsel was asking you questions about a latter motor vehicle accident that I think occurred in 1997. The diagnoses you discussed in your initial direct

testimony, was that accounting for the 1997 motor vehicle accident?

A Yes. I was well aware of that when I did this evaluation.

Q And the diagnoses that you already gave in that initial direct examination, were those specifically in your medical opinion related solely to the slip and fall in 1995?

A Yes.

MR. BRIDGES: Thank you, Doctor. That's all the questions I have.

EXAMINATION

BY MR. JENSEN:

Q Just a couple follow-up. On an average, Doctor, how many times do you testify in legal proceedings in a month on an average, ballpark?

A Very seldom. I am frequently asked to testify or scheduled. Most of them are Labor and Industry cases either before the Appeals Board or for the Attorney General. The vast majority of them get canceled. I doubt I testify more than once a month.

Q How many times have you testified in December this year, for example, if you recall? December of last year. Excuse me.

A I'd have to look. You know, I have a calendar. I would think it's maybe once or twice. And to the best of my knowledge they were for the Attorney General of the State of Washington.
Q Are you working -- I mean, are you more or less on retainer for the Attorney General right now?
A No.
Q Are you on call for their exams?
A No. When you do independent medical evaluation with Department of Labor and Industry, in order to be a certified examiner for them, you have to agree to be available to testify.
Q So -- now, I remember you went through your work record and history, your curriculum vitae, and all that. But basically what are you -- are you more or less semiretired now then?
A That's correct.
Q And do you have any other income other than maybe your investments -- I mean, as far as practicing as a physician other than IME examinations?
A Yes.
Q Do you have a regular practice going on then?
A No. As I testified to, I'm medical director for a rehab unit, skilled nursing facility. And I also -- besides my IME's, I also get reimbursed for testimony

I do for the Department of Labor and Industry.
Q Are you board certified in orthopedic surgery?
A Yes.
Q Now, before you came in to testify at this deposition today, did you have a discussion with Mr. Bridges so he could tell you what he was going to be looking for in your testimony?
A No. We had a very brief discussion. I got lost getting here. I didn't get here about ten minutes before you did. And he basically told me he was going to be going through these records. And we didn't go over anything specific other than that.
Q How long ago did you go through these records?
A Those that --
Q The ones that we testified to today.
A Well, most of these are summarized in my report.
Q I see.
A So --
Q Do you have a copy of your report here today?
A I do.
MR. JENSEN: You didn't have it as an exhibit, did you?
MR. BRIDGES: No.
Q You mind if I look at that for a second before we conclude this?

MR. JENSEN: Let's go off the record for a second.

MR. BRIDGES: Let's stay on the record real quickly.

I'm going to object. This is well out of the scope of the examination.

(Off the record.)

BY MR. JENSEN: (Continuing)

Q Doctor, I note on page -- I just looked through -- briefly through your -- this is like what, ten page -- how many pages is this? 12-page independent medical exam. And you would agree with me that a lot of this concerns the -- not the accident that's the subject of this lawsuit, the 1995 accident? Would you agree with that?

MR. BRIDGES: Object as to relevance and out of the scope.

A Parts of it refers to the motor vehicle accident.

Q Yeah. The greater part does not, though; isn't that correct?

MR. BRIDGES: Same objection.

A I'm not sure how you would divide that. I -- the history and the examination and everything, there were two injuries that I had records of. One was the slip and fall in '95. The other was the motor vehicle

accident. So it's all part of the same evaluation.

Q Okay. All part of the same evaluation, all right.

On page 6, I note at paragraph one, two, three, four, and see if I can quote it correctly. It says, quote, "Ms. Schmidt relates her symptoms decreased to the point that if she just went about activities of daily living, she did not have symptoms. However, if she attempted to play ball or throw a baseball with her son or opened a drawer, she developed symptoms," end quote.

Is that -- now, is that referring to the evaluation overall for the two injuries -- I mean, the injuries that were alleged on 1995, the slip and fall, and the motor vehicle, or is this subsequent to both those accidents?

MR. BRIDGES: I'm just going to -- hang on a second, Doctor.

So I don't have to keep saying this every time, I'm just going to make a standing objection as to this entire line of questioning as being out of the scope of the last redirect and recross.

So with that standing objection, ask away.

MR. JENSEN: Okay. Well, let me qualify the question, and I'll repeat it.

BY MR. JENSEN: (Continuing)

Q After reading through this quickly, I note that you've -- you've done evaluation of the whole -- of all her injuries. I mean, the injuries that she allegedly got in the car wreck and the injuries she allegedly got in the slip and fall in 1995.

Now, in that particular paragraph that I just read into the record, does that refer to the result of both injuries or the result of the injuries -- or your examination, or just what does that refer to?

A I'm not sure. It could be either/or. I'm not sure.

Q So you can't say with specificity whether that refers to post slip and fall or post slip and fall and post automobile accident?

A Correct.

MR. JENSEN: Thank you. That's all I have.

EXAMINATION

BY MR. BRIDGES:

Q Just a couple. And I apologize for beating a dead horse.

Counsel was asking you some questions about your work with Labor and Industries and work --

MR. BRIDGES: Counsel, the microphones are really sensitive. If you could just bear with us for a second.

MR. JENSEN: Sure.

MR. BRIDGES: You never know until you hear the tape later. I'm not trying to imply anything. It's just --

BY MR. BRIDGES: (Continuing)

Q Counsel was asking you questions about working for the Independent Medical Service panel and such. And I just want to be really clear.

You said you're retired or semiretired now. On a day-to-day basis, sir -- you were an orthopedic surgeon with the army and then in private practice -- were you a physician who had hands on in treating patients with these types of injuries?

A For over 35 years, yes.

MR. BRIDGES: Okay. Thank you, Doctor. That's all that I have.

MR. JENSEN: That's all I have. Thank you, Doctor.

(Whereupon, at 4:37 p.m., the deposition concluded.)

(Signature waived.)

Appendix 4

Franciscan Health System
St. Joseph Medical Center
Tacoma, Washington

ADMISSION RECORD

DEMOGRAPHIC AND FINANCIAL INFORMATION

ADMIT DATE	TIME	ROOM/BED	PT. TYPE	SERVICE	PUBL	PATIENT LANGUAGE	PATIENT ACCOUNT NUMBER	MEDICAL RECORD (UNIT) NO.
04/01/97	14:44		ECU	EMR			9709103452	

PATIENT LEGAL NAME (LAST, FIRST, MIDDLE, ENTITLE)	DATE OF BIRTH	AGE	SEX	MS	SOCIAL SECURITY NUMBER
SCHMIDT,TERESA	01/19/67	30Y	F	S	

PATIENT LEGAL ADDRESS	CITY, STATE, ZIP	HOME TELEPHONE

PATIENT EMPLOYER NAME	WORK TELEPHONE & EXTENSION	OCCUPATION	STATUS	RETIREMENT DATE	VET	MIL ID
LAW OFFICES	(206)272-5505	SCTY	1		No	

PATIENT EMPLOYER ADDRESS	CITY, STATE, ZIP
107 TACOMA AVE S	TACOMA WA 98403

ADMITTING DIAGNOSIS	PROCEDURE
BACK PAIN	

ADMITTING PHYSICIAN	REFERRING PHYSICIAN
99999 PHYSICIAN,UNKNOWN NOS	

ATTENDING PHYSICIAN	PRIMARY CARE PHYSICIAN
99999 PHYSICIAN,UNKNOWN NOS	

EMERGENCY CONTACTS

	NAME OF PERSON TO NOTIFY	RELATION TO PATIENT	HOME TELEPHONE	WORK TELEPHONE & EXTENSION
1	SCHMIDT,JUDY	MOTHER		
	ADDRESS OF CONTACT #1			EMPLOYER NAME OF CONTACT #1
2	NAME OF PERSON TO NOTIFY	RELATION TO PATIENT	HOME TELEPHONE	WORK TELEPHONE & EXTENSION
	ADDRESS OF CONTACT #2			

GUARANTOR INFORMATION - PART I

GUARANTOR NAME (LAST, FIRST, MIDDLE, ENTITLE)	RELATION TO PATIENT	HOME TELEPHONE
SCHMIDT,TERESA	SELF	

GUARANTOR ADDRESS	CITY, STATE, ZIP

GUARANTOR EMPLOYER NAME	WORK TELEPHONE & EXTENSION	OCCUPATION	SOCIAL SECURITY NUMBER
LAW OFFICES	(206)272-5505	SCTY	[redacted]

GUARANTOR EMPLOYER ADDRESS	CITY, STATE, ZIP
107 TACOMA AVE S	TACOMA WA 98403

INSURANCE INFORMATION

	HOSPITAL PLAN	INSURANCE NAME	POLICY OR RECIPIENT NUMBER	GROUP OR CLAIM NUMBER
1				
	SUBSCRIBER NAME	RELATION TO PATIENT	AUTHORIZATION NUMBER / LOS	COMMENTS
2				
3				

ADDITIONAL DATA

LAST SERVICE DATE	PREVIOUS ADMISSION NAME	X-RAY NUMBER	FC	CHARITY CARE	RELIGION	RACE	ADM CLERK	ADM CLERK
			P		CRI	1	PAT	PAT

ACCIDENT DATE	EMP REL	TIME	PLACE OF ACCIDENT	NATURE OF ACCIDENT
04/01/97	NO	12:00	11TH ST AND YAKIMA	MVA

ADM TYPE	ADM SOURCE	FACILITY REFERRING TO HOSPITAL	ARRIVAL MODE
1	7		POV

ADVANCE DIRECTIVES	ADVANCE DIRECTIVES DETAIL	REVISED INITIALS & DATE
NONE		

DISCHARGE DATE	

300080 (1/95)

01

2A

DISCHARGE AGAINST MEDICAL ADVICE

This is to acknowledge that I am leaving the hospital against the advice of my physician and by leaving may sustain health problems, injuries or even death.

I also acknowledge that the hospital and my physician accept no responsibility for any harm or injuries I sustain as a result of leaving the hospital against medical advice.

My wishes concerning my relationship with my physician is as follows:

_____ A. I DO wish to terminate my patient relationship with Dr. _____. I no longer expect to receive care from this physician and will seek medical care from someone else.

_____ B. I DO NOT wish to terminate my patient relationship with Dr. _____. I expect to receive future care from this physician, if he/she agrees to treat me.

I understand that the hospital assumes no responsibility to notify my physician of my wishes as expressed above. ***It is my responsibility to contact my physician to arrange for any care after I leave the hospital.*** This form is for hospital records only.

I HAVE READ AND UNDERSTOOD THIS FORM, AND BY SIGNING IT I RELEASE MY HEALTH CARE PROVIDERS FROM ANY RESPONSIBILITY FOR ANY HARM OR INJURIES, INCLUDING DEATH, WHICH I MAY SUSTAIN AS A RESULT OF LEAVING THE HOSPITAL AGAINST MEDICAL ADVICE.

_____ _____
Patient Date

_____ _____
Witness Date

_____ _____
Witness Date

GENERAL DUTY NURSING: The hospital provides general duty nursing care. Assignment of a higher intensity of nursing care will be based on the patient's medical condition, physician order, and/or hospital policies regarding nursing care. I agree that the hospital shall in no way be responsible for providing special duty nursing care, except as described above, and is hereby released from any liability arising from the fact that such a care was not provided.

MEDICAL AND SURGICAL CARE: The patient is under the control of their attending physicians and the hospital is not liable for any act or omission in following the instructions of said physicians. I consent to any x-ray examination, laboratory procedures, anesthesia, medical or surgical treatment, or other hospital services rendered under the general or specific instructions of my physicians. **I recognize that all physicians furnishing services to me, including radiologists, anesthesiologists, and pathologists, are independent contractors and are not employees or agents of the hospital.**

CONTINUING MEDICAL EDUCATION: I understand that as part of a policy of continuing medical education, St. Joseph Hospital wishes to allow students of various medical and paramedical specialties to observe and/or participate in the care provided for its patients. I consent to the observations and/or participation of medical or paramedical students in the care provided to me while I am a patient at St. Joseph Hospital.

FOR YOUR INFORMATION: It is the hospital policy to initiate cardiopulmonary resuscitation in the event of a cardiac or respiratory arrest, unless a do-not-resuscitate (DNR) order has been written on the patient chart by the attending physician. If you have any questions regarding this policy, please contact your physician.

PERSONAL BELONGINGS: I understand that there are no facilities available for securing personal belongings, other money and valuables which my be placed in a safe provided by the hospital for safekeeping. I understand that any personal belongings kept in my room or on my person are kept at my own risk and agree that the hospital shall have no liability in the event any of these items are lost or damaged. I have been advised that I should not keep money or valuables in excess of $5.00 on my person while I am in the hospital and that I am solely responsible for the security of any money, valuables, or other personal property that I elect to retain.

Please initial the section that applies to you.

_____ I DO NOT HAVE ANY CURRENCY IN EXCESS OF $5.00, OR ANY VALUABLES ON ME	_____ I AM PLACING MY VALUABLES IN SAFEKEEPING SAFEKEEPING ENVELOPE NO._____	_____ I ELECT TO KEEP MY MONEY/VALUABLES WITH ME. I RECOGNIZE THAT THE HOSPITAL WILL NOT BE RESPONSIBLE FOR THEM SINCE THEY HAVE NOT BEEN PLACED IN SAFEKEEPING WITH THE HOSPITAL

GUARANTEE OF HOSPITAL ACCOUNT: In consideration of services rendered I agree to pay all amounts due or become due on this account. These amounts shall be determined by charges fixed by the hospital for services, medicines, supplies, and hospitalization received during the period covered by this treatment period. I agree to pay the cost of the room assigned in the event that the requested room is not available. Copies of all charges and costs may be obtained at the Business Office of the hospital on request. I agree to pay lawful interest, and in the event it becomes necessary to refer this account to an attorney for collection, I agree to pay reasonable attorney's fees and collection costs.

RELEASE OF INFORMATION: I authorize the hospital to disclose all or any part of may medical or financial records to any party, or its agents, who is or may be liable under any contract to the hospital, myself, a family member, or any employer for all of any part of the hospital charges. All or any part of my medical records may also be released to other health care agencies when subsequent health care is to be provided by those agencies.

ASSIGNMENT OF BENEFITS: I hereby assign to St. Joseph Hospital and to hospital-based physicians the rights under any contract between such party and me, a member of my family, or an employer, by which such party is or may be labile for all or any part of the charges for hospital services and hospital-based physicians' services, and I authorize payment by such party directly to St. Joseph Hospital and hospital-based physicians.

FOR MEDICARE PATIENTS ONLY: Authorization to Release Information and Payment Request. I certify that the information given by me in applying for payment under the appropriate titles of the Social Security Act of H.B. 89-97 is correct. I authorize release of any information needed to act on this request for payment from Medicare or any other governmental payment program. **I HAVE RECEIVED A COPY OF THE MEDICARE BENEFICIARY NOTIFICATION OF PRO REVIEW DATED MARCH 26,1986** _____.

NOTICE TO OBLIGOR: (a) Do not sign this agreement before you read it. (b) You are entitled to a copy of this agreement at the time you sign it. (c) You may, at any time, pay off the full unpaid balance under this agreement.

OBLIGOR ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS AGREEMENT.

Signed: X _____ (Patient) Date 4-1-97

Admitting Secretary or Financial Counselor

Signed: X _____ (Obligor) Date _____

Relationship to Patient: _____ Address: _____ Apt. No. _____ Phone: _____

City _____ State _____ Zip _____

ADDRESSOGRAPH

Franciscan Health System

St. Joseph Medical Center

Tacoma, Washington

CONDITIONS OF ADMISSION / FINANCIAL AGREEMENT

S-112128 (05-96) 03

SCHMIDT, .TERESA

CHIEF COMPLAINT: The patient is a 30-year-old female who arrives in the emergency department ambulatory with the complaint of injuries suffered in a motor vehicle accident. The patient was the restrained driver who suffered a deceleration type accident at approximately 35 miles an hour approximately two and one-half hours prior to arrival. She describes being thrown forward, initially feeling that she was sore but not seriously hurt. She then describes returning home and noting the onset of multiple areas of discomfort, taking a Percocet and Methocarbamol prior to arrival. The patient is currently complaining of a migraine headache, neck soreness, mid back soreness, muscular radiation of discomfort from the mid back around to the bilateral upper quadrants and lower anterior chest wall. She denies abdominal pain or neurologic deficits. She feels increased discomfort with movement and deep inspiration.

PAST MEDICAL HISTORY: Remarkable for hypothyroidism. She has no history of neck or back complaints.

SOCIAL HISTORY: The patient works as a secretary.

ALLERGIES: None known.

LOCAL PHYSICIAN: None.

PHYSICAL EXAMINATION:
VITAL SIGNS: Unremarkable.
GENERAL: The patient is an uncomfortable, alert, young female who is sitting forward on the gurney in a Philadelphia collar placed by nursing staff.
HEENT: The head is normocephalic and atraumatic. Ears, nose and throat are clear.
NECK: She remains in cervical spine precautions.
BACK: There is mild diffuse tenderness over the mid back soft tissues. She has normal range of motion of the thoracolumbar spine.
LUNGS: Clear.
CARDIOVASCULAR: Regular rate and rhythm.
CHEST WALL: Stable. She has mild tenderness over the course of the restraining seat belt from the left clavicle over the right anterior chest wall.
ABDOMEN: Soft and flat. There are positive bowel sounds. There is mild tenderness to palpation of the abdominal wall musculature in the right upper and left upper quadrants with no significant deep discomfort to palpation.
NEUROLOGIC: The patient is alert and oriented. Her exam is nonfocal. Negative straight leg raising is demonstrated.

The patient is sent to Radiology where x-rays of the cervical spine are read as negative. The cervical collar is removed. She demonstrates a full supple range of motion of her neck. She continues to complain of a headache and diffuse soreness.

IMPRESSION:
1. Neck and back strain, status post motor vehicle accident.

The patient is discharged to home. She is instructed in the use of over the counter ibuprofen and prescribed Vicodin, #15. The patient is to follow up with physician of choice. She is taken off work for one day. She is to return to the emergency department immediately for any concerns.

Dictated and Authenticated by:
THOMAS J. MINTER, M.D.

TM/x751r
D: 04/01/97 T: 04/02/97 Confirmation #: 05
cc: Base Station

ADDRESSOGRAPH

SCHMIDT, TERESA

MR# OUTPATIENT
ACCT# 04/01/97
THOMAS J. MINTER, M.D.

Franciscan Health System

St. Joseph Medical Center, Tacoma, Washington
St. Clare Hospital, Lakewood, Washington
St. Francis Hospital, Federal Way, Washington

EMERGENCY DEPARTMENT REPORT

S-111450 (1/97)

INITIAL ASSESSMENT

TIME 1452 WNL ABN DETAILS OF ABNORMALITIES

HEAD ✓ PUPIL SIZE LT RT. WEAKNESS/PARALYSIS LOC

NECK ✓ COLLAR PAIN

HEART ✓ CARDIAC RHYTHM:

PULSES PEDAL: RIGHT Y N LEFT Y N PULSES RADIAL: RIGHT Y N LEFT Y N

EDEMA Y N JVD DISTENTION Y N

AV FISTULA BRUIT/THRILL Y N Dialysis/Port Access Y N

LUNGS ✓ RESPIRATION: SHALLOW LABORED RETRACTION RALES RHONCHI WHEEZING

COUGH: Y N PRODUCTIVE: Y N SPUTUM: SMOKES Y N

ABDOMEN ✓ NAUSEA VOMITING DIARRHEA PAIN DYSURIA

PELVIS ✓ GRAVIDA PARA LMP EDC FHT ⊕ DISCHARGE YES NO

EXTREMITIES/PULSES ✓ EDEMA COLD DISCOLORATION DOMINANT HAND RT. LT.

BACK/SPINE ✓ PAIN NUMBNESS/TINGLING BACKBOARD

INTEGUMENT ✓ DETAILS: BURNS BRUISES LACERATION ABRASION RASH DECUBITUS

APPROPRIATE PATIENT PROTOCOL INITIATED PER CHIEF C/O ☐YES ☐NO PRIMARY NURSE SIGNATURE:

ONGOING ASSESSMENT

TIME	BP	P	R	RHYTHM	GCS E	V	M	SAO2

IV FLUIDS

TIME	NO.	SOLUTION	AMT.	BY

PROCEDURE

TIME DONE	INITIALS		TIME DONE	INITIALS
		POSTURAL VS		UA DIP
		ABG's		Bedside Breath Alcohol
		MONITOR	NURSE'S NOTES:	☐ See Continuation Record
		EYE IRRIGATION		
		NG OR OG TUBE		
		FOLEY/FEM CATH		
		LAVAGE		
		NURSE DRAW		
		RESTRAINTS		
		EKG		
		ACU CHECK		

MEDICATION/PROCEDURES

TIME/INIT.	MEDICATION/PROCEDURE	DOSE	Rte.	SITE	RESPONSE/NAR
	Oxygen by	at		liters	

Adult DT: Lot # Manufact.

IDENTIFY INITIALS BY SIGNATURE & TITLE 1 2 3 4

DISCHARGE

DISPOSITION

Discharge @ 1555 with [illegible] to [illegible] AMA / Eloped

Admit to via @ Belongings Y/N

Transfer to via

Old Records(s), X-Rays sent Y/N F/U MD/Clinic Medicaid

Report given to @

Primary RN Signature 1 [illegible]

2 3

DISCHARGE RN [illegible]

☐ No change in physical assessment

☐ Pt. understands/verbalizes instructions

☐ Pt. understands medication therapy

PROPERTY

☐ NONE
☐ PATIENT
☐ FAMILY
☐ FRIEND
☐ POLICE
☐ SAFE

ENVELOPE NO.

ADDRESSOGRAPH

Franciscan Health System

St. Joseph Medical Center

Tacoma, Washington

EMERGENCY SERVICES CARE RECORD

S-110540 (8/9[illegible]

DATE	NAME (Last, First, Middle)	INSURANCE	DATE OF BIRTH	AGE	PATIENT NUMBER	CATEGORY
5 9/1/97	Schmidt, Teresa L		1/19/67	30	-	3

TIME: 1430

TRIAGE NOTES

CC: Neck and back pain ↑ MVA ~~t~~ today. Pt driver of Jarrett ? T boned car in front approx 35mph

PAST HISTORY: LMP - now, Thyroid

PHYSICIAN: ∅

PHYSICIAN:

IMMUNIZATION STATUS

☐ NOTIFIED

☐ NOTIFIED

ALLERGIES: NKA

CURRENT MEDS: Pt Synthroid - took 1325 (400) ~~percocet~~ ? methocarbamol 500mg ii 1355 ? relief

SEE LIST ☐

INITIAL INTERVENTION(S): Philadelphia Collar

VISUAL ACUITY:

TRIAGE RN SIGNATURE: [signature] RN

TEMP	PULSE	RESP	B/P	POSITION	RASaO2	EST. WT.
	76	16	132/75			Kg lb

	INT.	EXC.
AIRWAY	✓	
BREATHING	✓	
CIRC.	✓	

CIRCULATORY ASSESSMENT

Skin Color	Skin Moisture	Skin Temp.	Capillary Refill
✓ Normal	✓ Normal	✓ Normal	(Normal)
Cyanotic	Dry	Hot	Delayed >2 sec
Pale	Moist	Warm	None
Ashen	Diaphoretic	Cool	Open Bleeding Y N
Flush		Cold	If yes, list source

FOREIGN LANGUAGE:

GCS SCALE

EYE		VERBAL		MOTOR	
Spont	(4)	Oriented	(5)	Obeys	6
To Voice	3	Confused	4	Localizes	5
To Pain	2	Inapp Wd	3	Withdraw	4
None	1	Incomp Wd	2	Flexion	3
		None	1	Extension	2
				None	1

APPEARANCE: (Clean) Dirty Unkempt Other

BEHAVIOR: (Cooperative) Restless Agitated Hostile SUSPECTED ABUSE? Y/(N)

Confused Appropriate to situation (Y)/N SECURITY CODE I

EYE CONTACT: Y/N AFFECT: (Normal) Flat SEARCHED Y/N

SUPPORT SYSTEMS: Lives Alone Family/SO/Friends Counselor Other

IDEATION: Suicidal Suic. w/plan Homicidal HALLUCINATIONS: Aud Vis.

BEHAVIOR APPROPRIATE TO AGE: ☑ YES ☐ NO

TIME	LABORATORY	TIME	PHYSICIAN PLAN/ORDERS	INIT.
	☐ CBC		☐ Medical Records	
	Hgb		☐ EKG	
	Hct			
	WBC			
	Diff			
	☐ β HCG			
	☐ Chem 7			
	☐ Chem 19			
	Na			
	K			
	Cl			
	CO2			
	☐ BUN			
	☐ Glucose			
	☐ Creat			
	☐ UA			
	☐ UA Dip			
	☐ C&S OF:			
	☐ ABG			
	FIO2			
	pO2			
	pCO2			
	pH			

X-RAYS	RESULTS
1507 c-spine yellow	∅

Time:

MD ASSESSMENT

2D — ∅HT ∅LOC

chest hurts: [illegible] — 4/pm H, ∅ neck, cl SOB (back)

∅ ... [illegible]

CSP [illegible]

ACAT [illegible]

[illegible]

Abd 135+ [illegible]

[illegible]

[illegible]

IMPRESSION

Neck and back strains

MVA

DISPOSITION PLAN

F/U MD/CLINIC: ok

Rest ice

OTC ibuprofen, 800 tid prn

Vicodin #15

Flexeril [illegible]

[illegible]

WOUND CARE

Laceration Length ... Sutures

Prep

Anesthesia

Irrigation ... Wound Check ... days

Dressing ... Suture Removal ... days

☐ See Traumagram DICTATED ☐ NO ☒ YES

CONDITION AT DISCHARGE: ✓ TIME:

☐ Good ☐ Serious ☐ Improved

☐ Fair ☐ Critical ☐ Expired

PHYSICIAN SIGNATURE [signature]

White – Chart Copy Yellow – Patient Accounts Pink – Attending Physician

ADDRESSOGRAPH

Franciscan Health System

St. Joseph Medical Center

Tacoma, Washington

EMERGENCY SERVICES CARE RECORD 847

0

Clinical Reason: BACK PAIN

CERVICAL SPINE 5 VIEWS

There is mild disc space narrowing at the C5-C6 level. No fracture, compression or subluxation is seen. The odontoid process is intact. The intervertebral foramina appears normal.

IMPRESSION: ESSENTIALLY NEGATIVE CERVICAL SPINE EXCEPT FOR MILD HYPERTROPHIC AND DEGENERATIVE CHANGES.

ICD: TRAUMA
ACR: 3

Dictated and authenticated by:
ANTHONY S. LAZAR, M.D.

AL/sj
DD: 4-2
DT: 04/02/97

Order Date and Time: 4-1-97 1507
Film #: 258912

Ord. M.D.: MINTER, THOMAS J
Pri. M.D.: PHYSICIAN UNKNOWN

ADDRESSOGRAPH

Pt. #:
SCHMIDT, TERESA
AD: 04/01/97

MR #:
DOB: 01/19/67 Sex: F
Serv: EME Room:

Adm. M.D.:
Ref. M.D.:

DIAGNOSTIC IMAGING REPORT

Franciscan Health System
St. Joseph Medical Center
Tacoma, Washington

S-367405 (05/86)

Franciscan Health System

St. Joseph Medical Center

1717 South "J" Street, Tacoma Wa. 98405

[redacted]

Name: **TERESA SCHMIDT** Med #:

Address: Phone:

Visit Date/Time: **April 1, 1997 15:52** Patient #: **9709103452**

Evaluation

Evaluation in the Emergency Department included triage, and a screening exam by the nurse. You were treated by the following Emergency Department staff: Physicians: DR. THOMAS J MINTER.

Tests

X-RAYS - These x-rays were read by the emergency physician and are reviewed by a radiologist. If there are any problems, we will notify you or your physician.

X-RAYS: CERVICAL SPINE

Diagnosis-1

Based on the evaluation/tests, the following diagnosis was made. Remember that this is a preliminary diagnosis and follow up with your referral physician may be necessary.

STRAIN of the neck

Strains are injuries (stretching/tearing) of muscles and other soft tissues.

INSTRUCTIONS:

Ice, rest, elevation and pain medication as needed help with the pain and swelling. Depending on the site of the strain, splinting or other immobilization may be necessary. If there is increasing pain, swelling, numbness, loss of function or weakness, call your referral physician or the emergency department.

Diagnosis-2

STRAIN of the back

Strains are injuries (stretching/tearing) of muscles and other soft tissues.

INSTRUCTIONS:

Ice, rest, elevation and pain medication as needed help with the pain and swelling. Depending on the site of the strain, splinting or other immobilization may be necessary. If there is increasing pain, swelling, numbness, loss of function or weakness, call your referral physician or the emergency department.

Take Home Medications

VICODIN

ACETAMINOPHEN/HYDROCODONE (Vicodin)

Vicodin is a drug used to relieve acute pain. If used for long periods or to treat chronic pain it may be addicting.

WARNINGS:

1. Do not take this drug if you are allergic to it.
2. Do not drink alcohol while taking this drug!

3. Notify your doctor before taking this drug if you: are breast-feeding or pregnant, are taking any other drugs (especially antidepressants, sedatives, anticonvulsants or alcohol) or if you have colitis, seizures, respiratory or urinary problems, gallbladder, liver, heart, kidney or thyroid disease.
4. Common side effects of this drug are nausea, constipation and drowsiness.
5. Do not drive or perform dangerous activities while taking this drug.
6. Stop taking this drug and contact your doctor immediately if you develop weakness, confusion, seizures, abdominal pain, rash, difficulty breathing, or severe nausea and vomiting.
7. Please keep this and all other medications out of reach of children.

IBUPROFEN
IBUPROFIN (Motrin)
Motrin is a non-steriodal anti-inflammatory medication used to relieve pain, swelling, and inflammation.
WARNINGS:

1. Do not take Motrin if you: are pregnant or breast feeding, have a history of ulcers, problems with bleeding or blood clotting, liver or kidney disease.
2. Stop taking Motrin and call your doctor if you develop a rash, difficulty breathing, vomiting, abdominal pain or any signs of bleeding.
3. Motrin should be taken with food or milk.
4. Please keep this and all other medications out of reach of children.

Referral Physician

MEDALIA ST. JOSEPH
1708 SOUTH YAKIMA
TACOMA, WA 98405
INTERNAL MEDICINE: 593-8400

You are being referred to a physician (or clinic) for follow up care. If this physician is new to you, he/she will see you at least once for follow up.

Additional Instructions

Apply ice packs to your injuries to decrease swelling and pain. Ice packs are best made with crushed ice or moist towels cooled in the freezer for 30 minutes. Apply ice pack for 30 min. every 2-3 hrs. during the first 48 hrs.

REST: Rest as much as possible to allow your body time to recuperate.

* TYPE IN INSTRUCTIONS: FOLLOW UP WITH THE DOCTOR OF YOUR CHOICE, RETURN IF ANY CONCERNS

I have received and can read the above instructions on April 1, 1997 at 15:52. The risks and benefits of being discharged home have been explained to me and I agree with the plans outlined above.

Signed: Teresa Schmidt **Relation:** self

Witnessed:

THIS SECTION TO BE COMPLETED BY TRIAGE NURSE.

EMPLOYEE NAME_____ DEPT._____

COMPANY NAME_____

COMPANY CONTACT_____ PHONE_____ EXT._____

TRIAGE INFORMATION ☐ ON-THE-JOB INJURY ☐ RETURN VISIT RECHECK

☐ ON-THE-JOB ILLNESS OR JOB RELATED ☐ OTHER

NATURE OF COMPLAINT_____

THIS SECTION TO BE COMPLETED BY PHYSICIAN OR R.N. RETAIN ORIGINAL (WHITE) FOR MEDICAL CHART REMAINING COPIES TO BE GIVEN TO EMPLOYEE.

TIME In_____ HOURS TIME DISCHARGED_____HOURS

DISPOSITION: ☐ MAY RETURN TO WORK WITHOUT RESTRICTION

☐ MAY RETURN TO WORK WITH THE FOLLOWING RESTRICTIONS:

☐ EYE PROBLEM:

☐ WEAR EYE PATCH_____ HOURS

☐ CAN ☐ CAN NOT DO WORK REQUIRING REPETITIVE EYE MOVEMENT OR ACCURATE DEPTH PERCEPTION

☐ WOUND RESTRICTION

☐☐ KEEP WOUND CLEAN AND DRY_____ DAYS

☐ ACTIVITY LIMITATIONS_____

☐ SUTURE REMOVAL ☐ RETURN TO ER ☐ REFERRED TO COMPANY MEDICAL SECTION

☐ SEE REFERRING PHYSICIAN

☐ BACK RESTRICTIONS

LIFTING ☐ LIGHT LIFTING (UP TO 20 LBS) ☐ MODERATE LIFTING (UP TO 50 LBS)

☐ SITTING AT WORKPLACE ONLY ☐ OCCASIONAL WALKING OR STANDING ☐ WALK CRUTCHES ONLY

☐ NO BENDING, REACHING OR CLIMBING

☐ OTHER_____

☐ OFF BALANCE OF THIS SHIFT ONLY ☐ REFERRED TO PHYSIC AL THERAPY

☒ UNABLE TO RETURN TO WORK FOR 1 DAYS
(CONTACT SUPERVISOR WITHIN 24 HOURS TO REPORT STATUS)

☐ REFERRED TO DR_____ TO BE SEEN IN NECESSARY

☐ REFERRED TO DR_____ TO BE SEEN **BEFORE** RETURNING TO WORK

COMPANY CONTACT CALLED ☐ YES ☐ NO BY_____ TIME_____

THIS SECTION TO BE COMPLETED BY M.D.

PHYSICIAN REPORT AND TREATMENT Neck and back injuries
MVA

PHYSICIAN SIGNATURE [signature] DATE 4/1/97

ADDRESSOGRAPH

Schmidt, Teresa

Franciscan Health System
St. Joseph Medical Center
Tacoma, Washington

INDUSTRIAL HEALTH
WORK RELEASE FORM

OF TACOMA
EMERGENCY DEPARTMENT
1717 SO. J. TACOMA 98401
(206) 591-6660

11

P-596222 9/94

DATE: 04/10/98

REFERRING PHYSICIAN: Richard N.W. Wohns, M.D.

INDICATIONS: Pain between shoulder blades with predominantly left arm pain.

HISTORY: This pleasant 31-year-old female presents to the pain clinic with a history of being involved in a motor vehicle accident in April 1997 where she T-boned an oncoming car. For the first couple of months after the accident she had a lot of pain between her shoulder blades including headaches and pain radiating predominantly down the left arm to the little and ring finger. Occasionally this did occur on the right side. Over the last five months or so the pain has improved significantly but she is still left with fairly severe pain at times which she rates as a 7 out of 10, on the average it is about a 4-5 out of 10. This is also accompanied with headache radiating from the occiput to the bifrontal area that occurred on a 6-7 times per week basis. She thinks at times she has weakness in her arms, particularly after the accident. However, this is mostly resolved and at present she is left with some numbness on the inner aspect of her left upper extremity from the axilla down to the elbow. She has been treated with physical therapy in the past and has had a cervical MRI done in March 1996 and repeated in April 1997. It shows congenital stenosis at C4-5, C5-6 and C6-7 with small disk bulges at these three levels with slight cord flattening. There also apparently is a small C3-4 disk bulge to the center at C3-4. Electromyelogram studies performed by Dr. Sueno are negative for radiculopathy.

PHYSICAL EXAMINATION: On physical examination, she is a healthy appearing woman in no acute distress. She walks with a normal gait, able to toe walk, heel walk, squat unassisted. In the sitting position she has immediate limited range of motion of her neck in all directions. She does indeed have some tenderness of the upper trapezoid muscle, however, no clear cut trigger points were identified. Motor in both upper extremities appears normal in all muscle groups. Her tendon reflexes are 2 out of 4 in both the triceps and biceps.

IMPRESSION: Congenital cervical stenosis at C4-5, C5-6 and C6-7 levels with probable cervical radiculopathy pain particularly in the C7-C8 area.

DISCUSSION: I discussed with the patient that I agree with Dr. Wohns. I think it might be worthwhile seeing whether a trial of cervical epidural steroid injections may help her with her pain. I told her what to expect from these injections, how the injections work and also their pitfalls, notably of potential complete lack of response and a less than 1% chance of a posterior puncture headache. She appeared to understand what was being said. All questions were answered and she signed a consent form to this affect wishing to proceed.

PROCEDURE: Cervical epidural steroid injection at C6-C7 level.

DESCRIPTION OF THE PROCEDURE: With the patient in the left lateral position, a Betadine alcohol prep was done and an 18 gauge Tuohy needle was easily inserted to a depth of 4 cm. Following an excellent loss of resistance, the patient did jump noticing a pressure paresthesia radiating down the right arm to her elbow. The needle was thus rotated to the left hand side. The loss of resistance was once again checked and thought to be excellent and thus 120 mg and 8 cc of preservative-free normal saline was incrementally instilled. There was no

Continued...

cerebral spinal fluid leakage, no needle paresthesias. The patient appeared to tolerate the procedure remarkably well and was briefly observed in the left lateral position. She did complain of a headache from the examination from moving her neck in the different directions.

DISPOSITION: The patient is instructed to return to the pain clinic in about two weeks' time for a follow up appointment. She wishes to be seen by myself.

Thank you for this referral.

Dictated and Authenticated by:
DERYCK S. WATERMEYER, M.D.

DSW/MRC9
D: 04/10/98 T: 04/10/98 Confirmation#: 02
cc: Deryck S. Watermeyer, M.D.
Richard N.W. Wohns, M.D.
Robert Klein, M.D.

Appendix 5

7601

ROBERT KLEIN M.D., P.S. INC.
Diplomate and Charter Member American Board of Family Practice

PHYSICAL AND HISTORY

Name: Schmidt, Teresa
Date: 04/16/97
Age: 01/19/67
DOI: 04/01/97

The patient is a 30 year old female. She is single and has one child who is 5 years old. She is currently employed as a secretary at a law firm.

PROBLEM: Post motor vehicle accident. The patient was the driver of a 1989 Fire Bird, wearing her seat belt. She was traveling through the intersection of 11th and Yakima Ave. on a green light when the other vehicle ran the red light. As a result this caused her to "T-bone" the other vehicle. Upon impact she was holding the steering wheel and does not recall hitting her head. She chose not to go to the hospital. Later that evening, due to the pain in her neck, back, left shoulder and headaches, she proceeded to St. Joseph Hospital. The emergency room physician ordered x-rays and prescribed pain pills. She was released and was advised to follow-up with her family physician.

The patient was seen in our office on 04/16/97. She presented with marked tenderness and stiffness of the cervical, thoracic and lumbar spine. She has marked headaches with pain behind both eyes. She also states that her left ankle is very sore and numb, which is worse when walking. She states that her lower back pain feels "terrible" and the upper back pain is "a mess". She also notes a left glutial pain as well as bi-lateral wrist and hand pain. Upon complete examination there is hypersensitivity along the paraspinal muscles. There is marked decrease in the range of motion of the cervical and thoracic region. Heel and toe walk is normal. She has marked tenderness in both shoulders as well as both thighs. There is also marked tenderness in both wrists.

PAST MEDICAL HISTORY: The patients past history reveals that on 12/23/95 she fell at a grocery store. From the injuries she was forced to stay in bed for three or four

Robert Klein M.D.

e: 4/10/2000. Patient: Teresa Schmidt. Etiology: MVA
set: 4/1/99. Age: 32 D.O.B.: 1/19/67. Allergies:

tory/notes:

Work History:

tress:

amily:

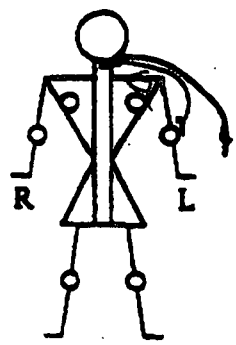
Current Meds:

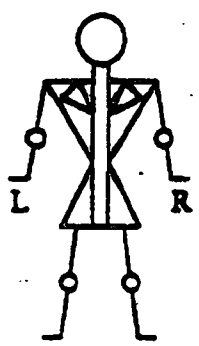
hysicians notes:

Diagnosis:

☐ headaches/occipical	784.0
☐ TM joint	524.6
☐ cervical strain	847.0
☐ cervical disc/radiculitus	722.4
☐ lumbar strain	846.0
☐ lumbar disc	724.6
☐ thoracic strain	847.1
☐ thoracic disc sciatica	
☒ carpal tunel syndrome	354.0
☐ shoulder	726.0
☐ chest/musculoskeletal	786.0
☐ gastro intest	
☐ urogenital	
☒ trauma/depression	300.0

amion:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches				
Cervical				
Lumbar				
thoracic				
legs				
arms				
shoulders				
hip raising				





Referrals:

x-ray:
MRI:
EMG:
Physical therapy:
chirop:
bio-feedback:

Consults:

ortho:
neuro:
other:

Rehab.:

YMCA:
pool/therapy:
pvt.clubs:
drug:
pain clinic:
vocational:
other:

Work release:

days off:
return:
modified:

PVT. Referrals:

DSHS:
other:

Report:

7513 Custer Rd W. Lakewood, WA 98499

Robert Klein M.D.

Date: 11 / 15 / 1999. Patient: Teresa Schmidt. Etiology: MVA
Onset: 4-1-97. Age: 32 D.O.B.: 1/19/67. Allergies:

History/notes: [illegible] neck (L) shoulder pain radiating to [illegible] + [illegible]

Work History: [illegible] Receptionist [illegible]

Stress: [illegible]

Family:

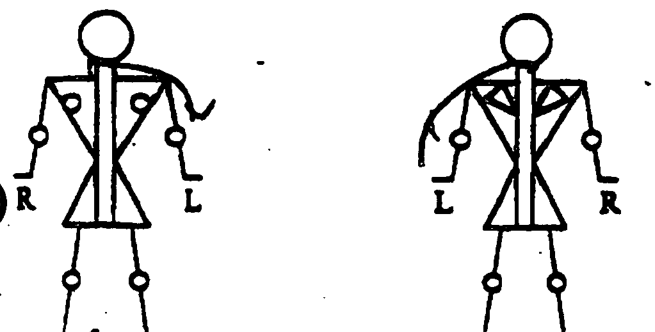
Current Meds:

Physicians notes:

Diagnosis:

☐	headaches/occipical	784.0
☐	TM joint	524.6
☒	cervical strain	847.0
☐	cervical disc/radiculitus	722.4
☐	lumbar strain	846.0
☐	lumbar disc	724.6
☐	thoracic strain	847.1
☐	thoracic disc sciatica	
☐	carpal tunnel syndrome	354.0
☐	shoulder	726.0
☐	chest/musculoskeletal	786.0
☐	gastro intest	
☐	urogenital	
☒	trauma/depression	300.0

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches				
Cervical	x [illegible]		[illegible]	
Lumbar				
thoracic				
legs				
arms				
shoulders				
hip raising				



Referrals:

x-ray:
MRI:
EMG:
Physical therapy:
chirop:
bio-feedback: → [illegible]

Consults:

ortho:
neuro: Dr [illegible]
other:

Rehab.:

YMCA:
pool/therapy:
pvt.clubs:
drug:

pain clinic:
vocational:
other:

Work release:

days off: [illegible]
return:
modified: [illegible]

PVT. Referrals:

DSHS: [illegible]
other:

Report:

[illegible]

Robert Klein M.D.

Date: 10/4/1999. Patient: Teresa Schmidt Etiology: MVA
Onset: 9-1-97. Age: 32 D.O.B.: 1/19/67. Allergies:

History/notes:

Work History:

Stress:

Family:

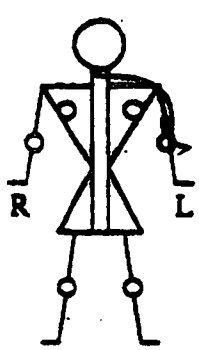
Current Meds:

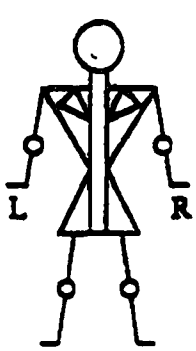
Physicians notes:

Diagnosis:

☐ headaches/occipical	784.0
☐ TM joint	524.6
☒ cervical strain	847.0
☐ cervical disc/radiculitus	722.4
☐ lumbar strain	846.0
☐ lumbar disc	724.6
☐ thoracic strain	847.1
☐ thoracic disc sciatica	
☐ carpal tunel syndrome	354.0
☐ shoulder	726.0
☐ chest/musculoskeletal	786.0
☐ gastro intest	
☐ progenital	
☒ trauma/depression	300.0

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches	+ +			
Cervical	+ + +		left	
Lumbar				
thoracic				
legs				
arms				
shoulders				
hip raising				





Referrals:

x-ray:
MRI:
EMG:
Physical therapy:
chirop:
bio-feedback:

Consults:

ortho:
neuro:
other:

Rehab.:

YMCA:
pool/therapy:
pvt.clubs:
drug:
pain clinic:
vocational:
other:

Work release:

days off:
return:
modified:

PVT. Referrals:

DSHS:
other:

Report:

Robert Klein M.D.

Date: Dec 1 1997 **Patient:** [illegible] **Etiology:** MVA

Onset: 4/1/97 **Age:** 30 **D.O.B.:** 01/19/67 **Allergies:** NKDA

History/notes: [illegible]

Work History:

Stress:

Family: [illegible]

Current Meds: [illegible]

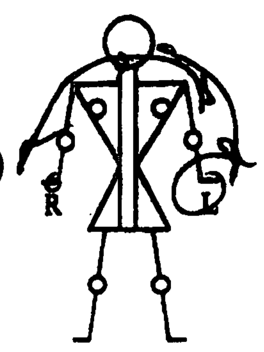
Physicians notes: [illegible]

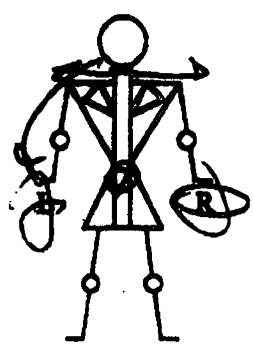
Diagnosis:

- ☒ headaches/occipical 784.0
- ☒ TM joint 524.6
- ☒ cervical strain 847.0
- ☐ cervical disc/radiculitus 722.4
- ☐ lumbar strain 846.0
- ☐ lumbar disc 724.6
- ☐ thoracic strain 847.1
- ☐ thoracic disc sciatica
- ☒ carpal tunel syndrome 354.0
- ☐ shoulder 726.0
- ☐ chest/musculoskeletal 786.0
- ☐ gastro intest
- ☐ urogenital
- ☒ trauma/depression 300.0

L > R ulnar neuropathy

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches				
Cervical				
Lumbar				
thoracic				
legs				
arms	[illegible] ulnar neuropathy L > R			
shoulders				
hip raising				





Referrals: [illegible]

x-ray:

MRI:

EMG:

Physical therapy: [illegible]

chirop:

bio-feedback: [illegible]

Consults: [illegible]

ortho:

neuro: [illegible]

other: [illegible]

Rehab.:

YMCA: [illegible]

pool/therapy: [illegible]

pvt.clubs:

drug: [illegible]

pain clinic: [illegible]

vocational: [illegible]

other:

Work release:

days off: [illegible]

return: [illegible]

modified:

PVT. Referrals:

DSHS:

other:

Report:

Robert Klein M.D.

JUL 15 1997

Date: 1/19 Patient: Gammidt, Teresa Etiology: MVA
Onset: 4/1997 Age: 30 D.O.B.: 11/1967 Allergies: NKDA

History/notes: Been ill — no energy
right in upper back + shoulders
stiff + sore

Work History: FT

Stress: Late on the jobs

Family: single — one son

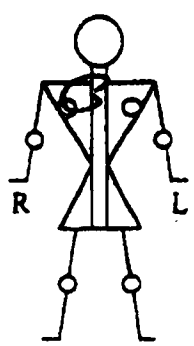
Current Meds: Flexeril inhaler
FBH — Zithromax —

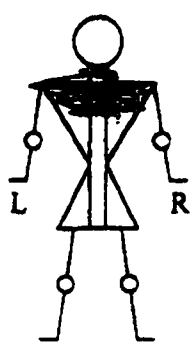
Physicians notes:

Diagnosis:

☐ headaches/occipical	784.0
☑ TM joint	524.6
☑ cervical strain	847.0
☐ cervical disc/radiculitus	722.4
☐ lumbar strain	846.0
☑ lumbar disc	724.6
☐ thoracic strain	847.1
☐ thoracic disc sciatica	
☑ carpal tunel syndrome	354.0
☐ shoulder	726.0
☐ chest/musculoskeletal	786.0
☐ gastro intest	
☐ urogenital	
☑ trauma/depression	300.0

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches	X			
Cervical		X 6	No	
Lumbar				
thoracic	X XX			
legs				
arms				
shoulders	XX			
hip raising				





Referrals:
x-ray:
MRI:
EMG:
Physical therapy: Motions Yale
chirop:
bio-feedback:
Consults:
ortho:
neuro:
other:
Rehab.:
YMCA: Start Date
pool/therapy:
pvt.clubs:
drug:

pain clinic:
vocational:
other:
Work release:
days off:
return:
modified:
PVT. Referrals:
DSHS:
other:
Report:

1...97

Robert Klein M.D.

Date: JUL [illegible] 1997 19 . Patient: Schmidt, Teresa Etiology: MVA .
Onset: 4-1-97 . Age: 30 D.O.B.: 01-1967 Allergies: NKDA .

History/notes: HA - had one day w/o one.
jaws not too bad -
knee comes & goes -

Work History: FT

Stress: easily irritable

Family: single - one son

Current Meds: IBU, flexeril
pain pill - at night

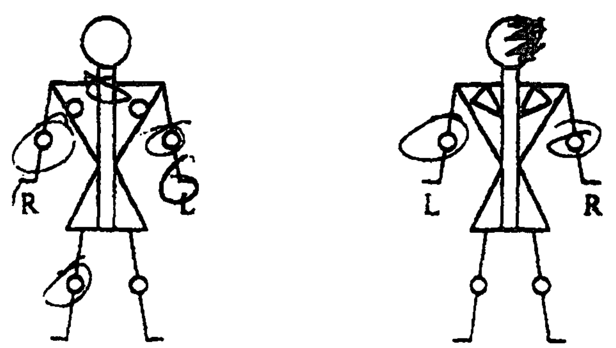
Physicians notes: has been ill
[illegible]

Diagnosis:

- [x] headaches/occipical 784.0
- [x] TM joint 524.6
- [x] cervical strain 847.0
- [ ] cervical disc/radiculitus 722.4
- [ ] lumbar strain 846.0
- [x] lumbar disc 724.6
- [ ] thoracic strain 847.1
- [ ] thoracic disc sciatica
- [x] carpal tunel syndrome 354.0
- [ ] shoulder 726.0
- [ ] chest/musculoskeletal 786.0
- [ ] gastro intest
- [ ] urogenital
- [x] trauma/depression 300.0

[illegible] C56

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches				
Cervical	++			
Lumbar	++	↓		
thoracic				
legs				
arms				
shoulders				
hip raising				



Referrals:

x-ray:
MRI:
EMG:
Physical therapy: T & Th Tomasic
chirop:
bio-feedback:

Consults:

ortho:
neuro:
other:

Rehab.:

YMCA: not yet
pool/therapy:
pvt.clubs:
drug:

pain clinic:
vocational:
other: [illegible] -

Work release:

days off:
return:
modified:

PVT. Referrals:

DSHS:
other:

Report:

Robert Klein M.D.

Date: 1/1997 . Patient: Schmidt, Teresa Etiology: MVA
Onset: 4-1-97 . Age: 30 D.O.B.: 01/19/67 Allergies: NKDA

History/notes: HA because of neck-upper back pain daily - several [illegible] ear pain sleep poor due to pain - jaw popping [illegible] [illegible] 2 wks ago leg gave out and she twisted knee.

Work History: full time - [illegible] tired crabby at end of day

Stress: [illegible] - easily irritable

Family: single - one son [illegible] [illegible] [illegible]

Current Meds: tylenol - for HA

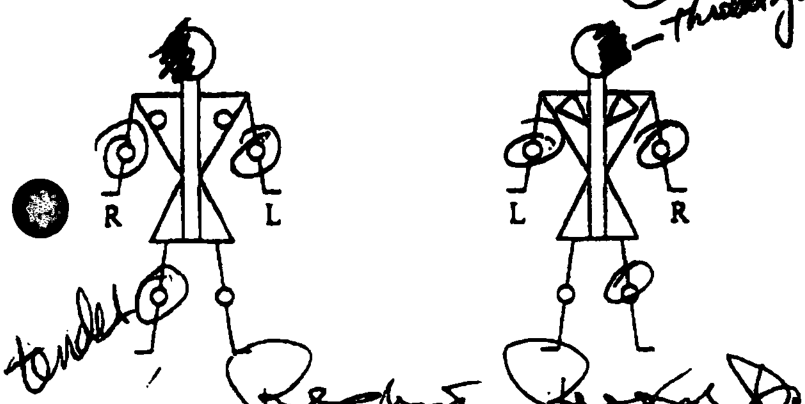
Physicians notes: [illegible] [illegible] [illegible] [illegible] [illegible] very depressed [illegible] [illegible] [illegible] wants deep tissue work.

Diagnosis:

- ☑ headaches/occipical 784.0
- ☑ TM joint 524.6
- ☑ cervical strain 847.0
- ☐ cervical disc/radiculitus 722.4
- ☐ lumbar strain 846.0
- ☑ lumbar disc 724.6
- ☐ thoracic strain 847.1
- ☐ thoracic disc sciatica
- ☑ carpal tunel syndrome 354.0
- ☐ shoulder 726.0
- ☐ chest/musculoskeletal 786.0
- ☐ gastro intest
- ☐ urogenital
- ☑ trauma/depression 300.0

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches				
Cervical	[illegible]		[illegible]	
Lumbar	[illegible]			
thoracic				
legs				
arms				
shoulders	L >	[illegible]		
hip raising				

Referrals:
x-ray:
MRI: [illegible]
EMG: [illegible] 7/3 3:00
Physical therapy: [illegible]
chirop:
bio-feedback: [illegible] 7/2 4:30
Consults:
ortho:
neuro:
other: Aphatin
Rehab:
YMCA: yes
pool/therapy:
pvt.clubs:
drug: Relafen 750 / Flexeril 10
pain clinic: [illegible]
vocational:
other: Bowen
Work release:
days off:
return:
modified:
PVT. Referrals:
DSHS:
other:
Report:



Request [illegible] [illegible] [illegible]

Robert Klein M.D.

Date: 1/19   Patient: Schmidt, Teresa   Etiology: MVA
Onset: 4-1-97   Age: ____ D.O.B.: ____   Allergies: ____

History/notes: C/O Lt hand pain c spasms cervical "fire pain" radiating into bilat arms. Lumbar pain "6" radiating into buttocks + legs. Rt leg numb bilat foot pain - worse upon walking over 2-3 hrs. [illegible]

Work History: full time 40 wk paralegal

Stress: pain

Family: single - 1 5 yo son

Current Meds: Relafen 750 mg

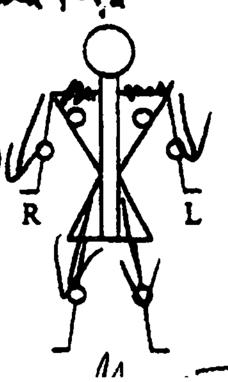
Physicians notes: Grip test reveals Ⓛ hand to be very weak. Pt is Ⓡ handed "sleeping very well." "Feel worse not" [illegible] paresthesia down the Ⓡ leg to feet

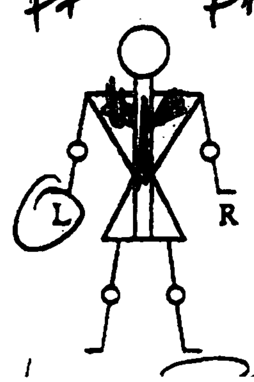
Diagnosis:

- ☑ headaches/occipical 784.0
- ☑ TM joint 524.6
- ☑ cervical strain 847.0
- ☑ cervical disc/radiculitus 722.4
- ☑ lumbar strain 846.0
- ☑ lumbar disc 724.6
- ☑ thoracic strain 847.1
- ☐ thoracic disc sciatica
- ☐ carpal tunel syndrome 354.0
- ☑ shoulder 726.0
- ☐ chest/musculoskeletal 786.0
- ☐ gastro intest
- ☐ urogenital
- ☑ trauma/depression 300.0
- ☑ Ⓛ hand/wrist sprain/strain

[illegible]

Evaluation:	PAIN	R.O.M.	MUSCLE SPASM	NEURO
headaches	++		++	++
Cervical	++	++	++	Rt, c paresthesia
Lumbar	++	++	++	++
thoracic	++	++	++	
legs Rt L	++		++	++
arms				
shoulders			++	
hip raising				
Ⓛ hand [illegible]			++	++





Referrals:

x-ray: ____
MRI: cervical/lumbar
EMG: ____
Physical therapy: Custer 2x weekly
chirop: ____
bio-feedback: ____

Consults:

ortho: ____
neuro: ____
other: ____

Rehab.:

YMCA: ____
pool/therapy: ____
pvt.clubs: YMCA - plan on working out for the summer.
drug: ____
pain clinic: ____
vocational: ____
other: ____

Work release:

days off: ____
return: ____
modified: ____

PVT. Referrals:

DSHS: ____
other: ____
Report:

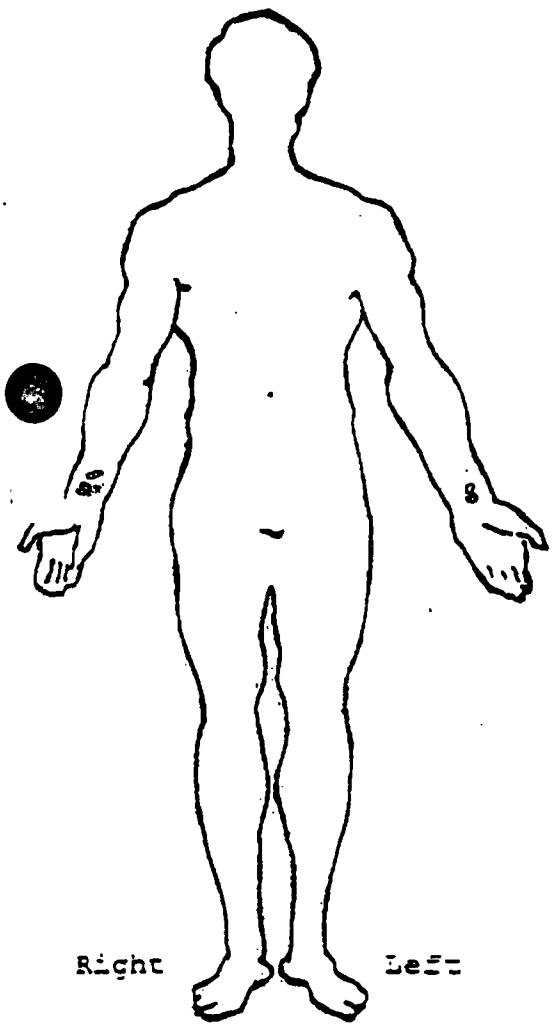
[illegible] Pain Drawing

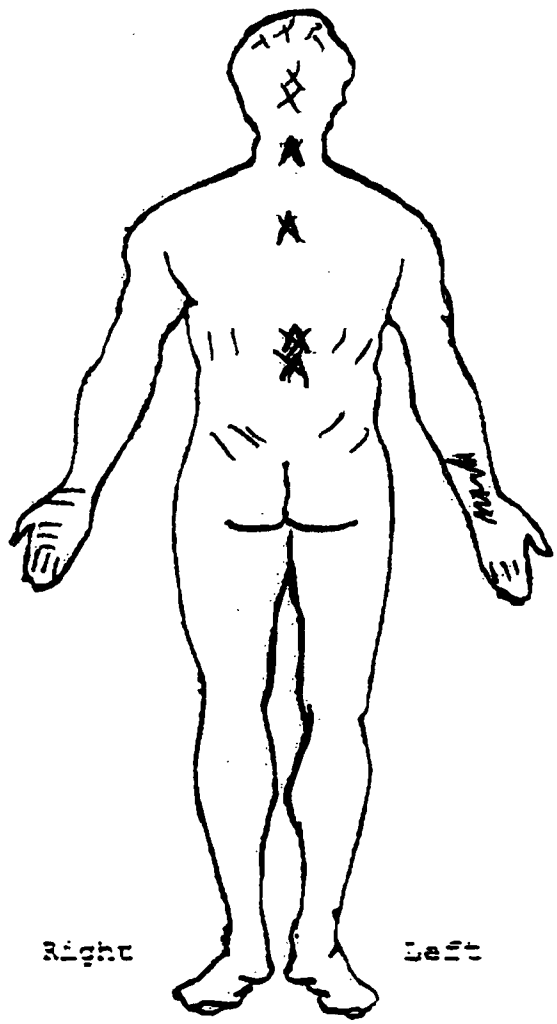
Name _____ Date _____

Where is your pain now?

Mark the areas where your body feel the sensations described below, using the appropriate symbol. Mark the areas of radiation. include all affected areas. To complete the picture, please draw your face.

Aching	Numbness	Pins and needles	Burning	Stabbing
^ ^ ^	= = =	o o o	x x x	/ / /





How is your pain now?
Please mark with X on the body where the pain is worst now.
Please mark on the line how bad is your pain now:

No pain _____ Worst possible pain

Appendix 6

Patient Name: Teresa L. Schmidt **Date of Exam:** 3/20/98
DOB: 1/19/67

Referred by: Dr. Klein

CHIEF COMPLAINT: Pain between the shoulder blades and left>right arm pain.

HISTORY OF PRESENT COMPLAINT: This is a 31 year old left handed white female who was involved in a MVA on April 1, 1997. Another car ran a red light and she t-boned that car. By that evening she had headaches and neck pain. Her pain has progressively worsened and she now has neck pain and headaches depending on activity. Her neck pain ranges from 5-10 out 10. She has headaches about once per week which is an improvement. The pain radiates from between her shoulder blades and down her left arm to her forearm. She has pain in the right arm to her elbow less often. She rates her arm pain at 5 out of 10. She has constant numbness and tingling in her hands and left forearm. She also has some numbness in the left shoulder blade. She has weakness in both hands. Prolonged sitting or standing, turning her head, movement of the upper body aggravate her symptoms. Valsalva maneuvers are positive. There are no bowel or bladder problems. At night, she feels that her distal arms and hands are like balloons and may explode.

In December 1995, she fell on a cement floor in a store, and noted neck pain and headache. She was treated conservatively and had an MRI scan 3 months later. She improved and had not had any cervical pain for months prior to the MVA.

TREATMENT TO DATE: Physical therapy did not help. Narcotic pain medication. Muscle relaxants. NSAID's. Paxil.

DIAGNOSTIC IMAGING: Cervical MRI scan obtained 3/11/96 showed congenital stenosis at C4-5, C5-6, and C6-7. There are small disc bulges at these three levels with slight cord flattening. There is also a small central disc bulge at C3-4 not mentioned in the official report. Cervical MRI scan obtained 4/18/97 shows essentially no change when compared to the 3/11/96 MRI scan.

ELECTRODIAGNOSTIC STUDIES: EMG study performed by Dr. Sueno was negative for radiculopathy, carpal tunnel syndrome, or ulnar entrapment.

PAST MEDICAL HISTORY
Previous Operations: tonsillectomy.
Present Medications: Synthroid, NSAID of unknown name, pain pill of unknown name.
Allergies: NKA
Height: 5'4"

Weight: 130#
Smoking: None.
Alcohol: Twice per month.

REVIEW OF SYSTEMS:
HEENT: Wears contacts.
Cardiovascular: Negative.
Respiratory: Negative.
Gastrointestinal: Negative.
Genitourinary: Negative.
Endocrine: Hypothyroidism.

FAMILY HISTORY: Thyroid problems in family, all females on mother's side had uterine cancer, diabetes.

SOCIAL HISTORY: Single. One child. She is a legal secretary.

PHYSICAL EXAMINATION:
A detailed neurological examination has been performed.
General appearance of the patient is appropriate.
Patient is awake, alert, and oriented times three.
Cranial nerves are grossly intact.
The cervical spine has extremely range of movements. The patient requested no palpation or movement of her neck. There is no evidence for cervical paraspinal muscle spasm.
Motor testing reveals normal strength and tone throughout.
Deep tendon reflexes are 2+ and symmetrical
Toe signs are downgoing and there is no clonus.
Sensory testing reveals hypalgesia over the ulnar side of the left arm from the elbow distally.
Phalen's and Tinel's are negative.
Adson's are negative.
Gait is normal.
Chest is clear.
Heart sounds are normal.

ASSESSMENT:
Congenital cervical stenosis C4-5, C5-6, C6-7
Acquired degenerative disc disease C3-4, C4-5, C5-6, C6-7, pre-existent to fall in December, 1996
Cervical pain and cervical radicular pain caused by MVA, on a more probable than not basis

RECOMMENDATION:
Cervical epidural steroid injections
The patient will return in 6 months.

Richard N. W. Wohns, M.D.

cc: Pacific Anesthesia

Appendix 7

Group Health Cooperative of Puget Sound

Adult Healtl Questionnai Age 20 – 64

Fac: TSC
Patient Name: SCHMIDT, Teresa L.
Med-Rec #: 00340338
SSN: 532649995
Date/Time: 12Jan99 / 9:00am
DOB: 19Jan67 Sex: F
Primary: ROUSE, M.
Attend: JOHNSON, R.
Account #: 002011651
Plan: BHP

Dept: FP
Chart Loc: TAC
Prov #:0025
Prov #:0027

Date 1-12-99

This questionnaire will become a CONFIDENTIAL AND [illegible] protected by law.
We encourage you to fill out the entire form. **If you do not want to answer a question, leave it blank.**

Background Information

Name Teresa (First) L. (MI) Schmidt (Last) Age 31 ☐ Male ☒ Female

Address 1620 S. Stevens (Street) Tacoma (City) WA (State) 98405 (Zip Code)

Home phone 253-752-6288 Work phone 253-272-5505

Person to contact in case of emergency Judy Schmidt (Name) mom (Relationship) 756-0710 (Phone number)

Others living in your home (name, relationship to you, and age) _____

Usual work _____

Hobbies or interests outside work _____

Which category best describes your ethnic origin?

☒ White or Caucasian
☐ Black or African American
☐ Asian American or Pacific Islander
☐ Native American or Alaskan Native
☐ Hispanic
☐ Multiracial
☐ Other _____

About Today's Visit

What are your MAIN REASONS for today's visit?

☒ check-up ☐ feeling ill ☐ other concerns

At Group Health we'd like to help you stay well. Prevention of illness is a focus of this visit. What are your most important PREVENTION concerns for today's visit? _____

Please list other concerns you wish to discuss today.

_____

_____

Do you have a copy of the Healthwise Self-Care Handbook in your home?	☐ yes	☒ no
If NO, would you like information on how to get one?	☐ yes	☐ no
Have you signed a living will or power of attorney for healthcare?	☐ yes	☒ no
If NO, would you like information about this?	☐ yes	☒ no

Discussed? ☑	Provider Comments
☐	

Your Current Health

1 How would you describe your general health? ☒ excellent ☐ good ☐ fair ☐ poor

2 Have you had a tetanus booster within the past 10 years? ☐ yes ☒ no

a If YES, what year? ..... ———

3 During the past year have you noticed a change in a mole on your skin? ☐ yes ☒ no

4 Have you been feeling sad, blue, depressed or empty? ☐ yes ☒ no

5 Have you lost interest in or been unable to enjoy most activities? ☐ yes ☒ no

6 During the past year, have you had any major good or bad changes in your life? Explain _____ ☐ yes ☒ no

FOR ALL WOMEN

7 Have you ever had a breast lump or nipple discharge? ☒ yes ☐ no

8 When was your last Pap smear? date _____ ☐ never

a Have you ever had an abnormal Pap smear? ☐ yes ☒ no

9 Did your mother receive hormones (DES) for threatened miscarriage when pregnant with you? ☐ yes ☒ no

10 Number of: pregnancies 2 live births 1 miscarriages/abortions —

FOR WOMEN OVER 40 ONLY

11 Do you usually examine your breasts monthly? ☐ yes ☒ no

12 Have you had a mammogram? ☒ yes (date) 1985 ☐ no

13 Are you enrolled in the Group Health Breast Cancer Screening Program? ☐ yes ☒ no

14 Have you stopped having regular menstrual periods? ☐ yes ☒ no

a If YES, have you had vaginal bleeding since completing menopause? ☐ yes ☒ no

b If NO, have you had vaginal bleeding between periods? ☐ yes ☒ no

15 Would you like more information about menopause or hormone replacement therapy? ☐ yes ☒ no

FOR ALL MEN

16 Have you had a small or hidden (undescended) ball (testicle)? ☐ yes ☒ no

FOR MEN OVER 40 ONLY

17 Would you like a Group Health prostate cancer brochure? ☐ yes ☒ no

FOR WOMEN AND MEN OVER 40 ONLY

18 Have you had chest pressure or pain with physical activity during the past year? ☐ yes ☐ no

19 Do you have any trouble urinating or holding your urine? ☐ yes ☐ no

20 Have you had blood in your bowel movements during the past year? ☐ yes ☐ no

Discussed? ☑ Provider Comments

Late teens - Hormone Changes

Discussed

open to page 3

Lifestyle and Health Risks

This questionnaire will become a confidential and private part of your medical record. If you do not want to answer a question, leave it blank.

NUTRITION

1 **Add up the average number of servings you eat per day:**

a high fat food (fatty meats, fried foods, whole milk, regular cheeses, ice cream, donuts, cookies or chips)? ☐ none ☐ 1 ☐ 2 ☐ 3+

b a piece of fruit, a glass of fruit juice, or a ½ cup vegetables or fruit? ☐ 0-1 ☐ 1-2 ☐ 3-4 ☐ 5+

c a serving of grains or cereal (bread, rice, pasta, tortilla, etc.)? ☐ 0-2 ☐ 3-4 ☐ 5-7 ☐ 8+

For Women:

d high calcium foods or supplements (1 cup milk, yogurt, calcium fortified orange juice, 2 oz. cheese)? ☐ none ☐ 1 ☐ 2 ☐ 3+

e Do you take a folate supplement or multivitamin regularly? ☐ yes ☐ no

SAFETY

2 Do you have a working smoke detector in your home? ☐ yes ☐ no

3 Do you have a fire extinguisher in your home? ☐ yes ☐ no

4 If you ride a motorcycle or bicycle, do you wear a helmet? ☐ don't ride ☐ yes ☐ no

5 Do you always or nearly always use your seat belt when in a car? ☐ yes ☐ no

6 Do you ever drive or ride when the driver may have had too much alcohol or drugs? ☐ yes ☐ no

7 If you or any other household member own or keep any guns, do you store them unloaded and locked? ☐ no guns ☐ yes ☐ no

PERSONAL INJURY

8 Within the last 12 months, have you experienced any uncomfortable touching or forced sexual contact? ☐ yes ☐ no

9 Within the last 12 months, have you been in a relationship in which threats, pushing, grabbing, hitting, kicking, breaking things, or other hurting was used by someone? ☐ yes ☐ no

SEXUALITY

10 Do you have any questions about birth control or sexually transmitted diseases, or other sexual issues? ☐ yes ☐ no

11 What is your present birth control method? None

12 Are/~~were~~ your sexual partner(s): ☐ men ☐ women ☐ both ☐ never had sex

13 In the past year have you had sex with a new partner without using a condom? ☐ yes ☐ no

14 Do any of the following apply to you? ☐ yes ☐ no ☐ unsure

- I have had a sexually transmitted disease within the last five years (gonorrhea, chlamydia, genital herpes, syphilis, or genital warts).
- I have had 3 or more sexual partners in the last 12 months.
- I have had a male sexual partner who has had sex with other men.
- I have, or my sexual partner has used drugs by injection.
- I have given or received money or drugs in exchange for sex.
- I have had a sexual partner who was infected with HIV.

Discussed? ☑ Provider Comments

go to page 4

FOR OFFICE USE ONLY

PHYSICAL EXAM Height 64½ Weight 125 Blood Pressure 116/60

	Normal	Abnl	Not Indicated
HEENT	☒	☐	☐
Thyroid	☒	☐	☐
Heart	☒	☐	☐
Lungs	☒	☐	☐
Breasts	☒	☐	☐
Abdomen	☒	☐	☐
Genitalia/Pelvic	☒	☐	☐
Skin	☒	☐	☐

☐ Other (specify)

Interested in birth control. Has used Depo Provera in past

LAB Check if ordered ☑

- ☐ None indicated
- ☐ Hemocculs (over 50)
- ☐ Pap smear (every 2-3 years)
- ☐ Rubella titer (women of child bearing age without evidence of immunity)
- ☐ Varicella titer (see guideline)
- ☒ Serum Cholesterol/HDL ratio (see guideline)
- ☐ PPD skin test (if TB risk factor present)
- ☐ HIV (if indicated)
- ☑ Other (specify) TSH

IMMUNIZATIONS Check if ordered ☑

- ☐ None indicated
- ☐ Hep B (health jobs, from high risk area/ethnicity, positive on question 14 on page 3)
- ☐ Influenza (diabetes, asthma, immuno-suppressed, chronic disease – yearly)
- ☐ Measles (consider Rubeola if born after 1956 without evidence of immunity)
- ☐ Pneumovax (same risk group as influenza – once only)
- ☐ Tetanus (every 10 years)
- ☐ Other (specify) _____

LIFESTYLE AND HEALTH RISKS Check if discussed ☑

- ☐ None
- ☐ Nutrition
- ☐ Folate 4 ♀ CBA
- ☐ Safety
- ☐ Other (specify) _____
- ☐ Personal Injury
- ☒ Sexuality
- ☐ Tobacco, alcohol, drugs
- ☐ Physical activity

ASSESSMENT • PLAN
(may also be documented in body of questionnaire)

1) Hypo Thyroidism
2) Otherwise Healthy adult female

Plan: Labs, PAP
② BC info given - not sure which method she prefers - will CB when she decides

Provider Name [signature] PA-C Date 1-12-98

TOBACCO, ALCOHOL, AND OTHER DRUGS

15 Do you currently smoke? ☐ yes ☒ no

a How many cigarettes do you smoke per day? [ ]

b Are you considering quitting in the next 6 months? ☐ yes ☐ no

c Have you ever smoked regularly? ☐ yes ☒ no

d If YES, when did you quit? [ ]

16 Do you use chewing tobacco or snuff? ☐ yes ☒ no

17 Does anyone smoke inside your house or workplace? ☒ yes ☐ no

18 During the past five years, has the use of recreational or street drugs been a problem for you? ☐ yes ☒ no

19 During the past year have you consumed any alcoholic beverages? ☒ yes ☐ no (go to #26)

20 Have you ever felt you should cut down on your drinking? ☐ yes ☒ no

21 Have you ever felt annoyed by criticism of your drinking? ☐ yes ☒ no

22 Have you ever felt bad or guilty about your drinking? ☐ yes ☒ no

23 Have you ever had a drink first thing in the morning to steady your nerves or get rid of a hangover? ☐ yes ☒ no

24 Do you often have more than 2 alcoholic drinks a day? ☐ yes ☒ no

1 drink=1 glass beer, wine, or hard liquor drink

25 How often do you have six or more drinks on one occasion?
☒ never ☐ less than monthly ☐ monthly ☐ weekly ☐ daily or almost daily

PHYSICAL ACTIVITY

26 How many times per week do you exercise? ☐ none ☐ 1–2 ☒ 3–5 ☐ 5+

27 How many minutes does your exercise usually last? ☐ 1-15 ☐ 15–30 ☒ 30+

28 Is your exercise moderate to vigorous? ☒ yes ☐ no

Moderate to vigorous exercise is exercise such as brisk walking, active gardening, jogging, swimming, or bicycling.

29 Are you considering increasing your exercise in the next 6 months? ☐ yes ☒ no

Discussed? ☑ Provider Comments

☐ Aerobics

PAST OPERATIONS, INJURIES AND HOSPITALIZATIONS

Description	Date

please be sure that you have filled out page 5 — on the back of this page

Medical History

FAMILY HEALTH HISTORY

Mother's age 53 ☒ now ☐ or at death
Father's age 54 ☒ now ☐ or at death
Are you adopted? ☐ yes ☒ no

Number of brothers 0
Number of sisters 3
Number of children 1

For each illnesses below, please tell us if a parent, sibling (brother or sister), or child has had the illness.

	Parent	Sibling	Child
Alcohol problems	☐	☒	☐
Breast cancer	☐	☐	☐
Colon cancer	☐	☐	☐
Other cancer	☒	☒	☐
List type _____			
Depression	☐	☒	☐
Diabetes	☐	☐	☐

	Parent	Sibling	Child
Drug problems	☐	☒	☐
Heart attack before 60	☐	☐	☐
High cholesterol requiring medication	☒	☐	☐
High blood pressure	☐	☐	☐
Sickle Cell Anemia	☐	☐	☐
Stroke before age 60	☐	☐	☐
Tuberculosis	☐	☐	☐

☐ Other illnesses or conditions (explain) _____

PAST ILLNESSES AND CONDITIONS

Have you ever had any of the following?

- ☐ Alcohol problem
- ☒ Arthritis
- ☐ Asthma or emphysema
- ☐ Breast cancer
- ☐ Colon cancer
- ☐ Other cancer _____
- ☐ Chlamydia
- ☐ Depression
- ☐ Diabetes
- ☐ Drug problem
- ☐ Glaucoma
- ☐ Heart disease
- ☐ Hepatitis or liver disease
- ☐ High blood pressure
- ☐ High cholesterol
- ☐ HIV infection
- ☐ Hysterectomy
- ☐ Mental disorder
- ☐ Panic disorder
- ☐ Peptic ulcer
- ☐ Physical or sexual abuse
- ☐ Radiation treatment or radiation exposure
- ☐ Seizures (epilepsy)
- ☐ Stroke or near stroke
- ☐ Suicide attempt
- ☐ Syphilis
- ☒ Thyroid condition
- ☐ Tuberculosis or a positive tuberculosis skin test
- ☐ Ulcerative colitis or Crohn's disease

☐ Other illnesses or conditions (explain) _____

Provider Comments

Joint pain since childhood

CURRENT MEDICATIONS ☐ None

Include birth control pills and non-prescription items such as vitamins, pain medication, laxatives, aspirin, and herbs.

Medication/Drug	Dosage	Times Per Day	Reason
Vitamins	1	Per day	
Thyroid	2	1X	

Are you allergic to any medication? ☒ no ☐ yes (explain) _____

please be sure that you have filled out pages 3 and 4 — on the back of this page

Appendix 8

Office Visit

Teresa L Johnson (MRN 00340338)

Visit Information

Date & Time	Provider	Department	Encounter #
7/11/2005 11:00 AM	Kyle Smoot, MD, Physician	Tsc Neurology	66473773

Visit Summary

Reason for Visit

Other	loss of conciousness

Diagnoses

LOSS OF CONSCIOUSNESS [780.09X]

Allergies as of 7/11/2005 Date Reviewed: **7/11/2005**

(No Known Allergies)

Nursing Notes

LARSON, JUANITA 7/11/2005 11:23 am

Allergies and current medications were reviewed with the patient; provider to verify.
Pt. presents with 4 yr. hx of LOC.

Vitals

Vitals - Last Recorded

BP	Ht	Wt
92/60	5' 4" (1.626 m)	135 lb (61.236 kg)

Default Flowsheet Data (all recorded)

No Flowsheet Template found

BMI Data

Body Mass Index	Body Surface Area
23.17 (kg/m^2)	1.66 (m^2)

Progress Notes

Author	Status	Last Editor	Updated	Created
Kyle Smoot, MD	Signed	System	7/11/2005 12:00 AM	Unknown

Please see transcribed notes for additional visit information.

Transcription

Type	ID	Date and Time	Author
GHC Progress Note	1161894L-1	7/11/2005 12:09 PM	SMOOT, KYLE E

Authenticated by SMOOT, KYLE E Physician on 7/12/2005 at 1:52 PM
This document replaces document 1161894L

Document Text

Chart Home Base: PLP
cc: ANTHONY J KLAASSEN, MD
CARL B ERLING, MD

Patient is seen in consultation at the request of Dr. Carl Erling and a

copy of these findings will be sent to him.

This is a 38-year-old, left hand dominant female with a history of hypothyroidism who is being referred secondary to episodes of loss of consciousness.

She is unaccompanied at this visit.

Patient had two recent episodes of loss of consciousness. She attributes these episodes secondary to hypoglycemia. Both of these episodes occurred while she was walking down the stairs. The first one she was alone, and she awoke at the bottom of the stairs. She had diffuse aching; however she did not have any bowel or bladder incontinence. She also denied any tongue laceration. The second episode was preceded by mild lightheadedness. She did not have any chest pain, palpitations or shortness of breath. She was walking down the stairs and then she passed out, falling down the remaining portion. Her husband witnessed this episode. Afterward she was not confused. There was no motor activity or bowel or bladder incontinence.

The last episode occurred roughly six months ago as she was walking to bed. She was talking and all of a sudden she stopped talking and fell flat on her face. Again per report, there was no motor activity. These are the only three episodes she has had in the last year. Roughly two years ago she had an episode at the store where she fell secondary to her legs feeling weak. This was associated with a loss vision, but there was no loss of consciousness. Per report at that time she was diagnosed with hypoglycemia.

Patient does not have any visual or gustatory aura prior to these. She does not complain of any other symptoms such as chest pain or palpitations. She currently does not have any headaches, vision changes, dysarthria or dysphagia. She complains of some mild generalized weakness as well as some neck and lower back pain. She denies any abdominal pain, rash or joint pain.

Due to workup she underwent an EEG in June 2005 that did not show any focal slowing or epileptiform discharges.

PAST MEDICAL HISTORY
Hypothyroidism.

ALLERGIES
No known drug allergies.

MEDICATIONS
1. Folic acid.
2. Levothyroxine.

SOCIAL HISTORY
She lives in Puyallup. She works at a day spa. She does not smoke. Rare alcohol use, roughly one time per month.

FAMILY HISTORY
Father is alive with a history of diabetes. Mother has a history of underlying heart condition and cervical cancer. She has three siblings. There is a history of hypothyroidism, cervical cancer and possible hypoglycemia. She has one son who is healthy.

SEIZURE RISK FACTORS
She was a full-term baby with no complications. No history of febrile seizures, meningitis or encephalitis. No history of head trauma resulting in loss of consciousness for greater than 30 minutes.

EXAMINATION
She has a blood pressure of 92/60 with a weight of 135 pounds. GENERAL: The patient appears alert and comfortable. NECK: Supple. LUNGS: Clear to auscultation. CARDIOVASCULAR: Regular rate and rhythm. No evidence of murmur.

NEUROLOGIC
MENTAL STATUS: The patient is oriented and able to follow commands; speech is fluent, and naming and repetition is intact.
CRANIAL NERVES: Pupils are symmetric. There is no evidence of disk edema. Eye movements are full with no signs of nystagmus. Visual fields are full to finger testing. Facial sensation is equal bilaterally. There is no evidence of facial weakness or delay with activation of facial muscles. Hearing is grossly intact. Palate elevates symmetrically. Tongue is midline. MOTOR: The patient has normal tone and normal bulk. There is 5/5 strength throughout.
REFLEXES: 2+ and symmetric. The toes are flexor bilaterally.
SENSATION: Intact to light touch, proprioception, and vibration in all four extremities.
COORDINATION: Finger-to-nose and heel-to-shin are within normal limits. There is no evidence of dysmetria. Rapid alternating movements are rapid and regular with good amplitude.
GAIT: There is no evidence of ataxia with casual or tandem walk. There is adequate arm swing and stride length. The patient is able to walk on toes and heels without any difficulty.
Romberg test is negative.

LABORATORY DATA
Laboratory results include a TSH of 0.24, CBC was normal, glucose of 104, electrolytes on May 7 were normal. Creatinine of 0.6, BUN of 16.

EKG showed normal sinus rhythm.

IMPRESSION
This is a 38-year-old, left hand dominant female who is presenting secondary to episodes of alteration of consciousness. Her physical examination does not reveal any focal findings. Laboratory workup has been unremarkable except for a slightly low TSH of 0.24. EKG revealed normal sinus rhythm and EEG did not reveal any focal slowing or epileptiform discharges.

The exact etiology for these episodes of loss of consciousness is unclear. The clinical description seems to less likely represent seizures given the lack of preceding of warning, motor activity and postictal state. They may possibly represent an some underlying cardiac process as she is slightly hypotensive today. Hypoglycemic attack may also be an explanation. However, she does not have any significant preceding symptoms. Vasovagal response is possible especially the initial event two years ago.

RECOMMENDATIONS
1. CT scan of the head to rule out any focal mass.
2. Holter monitor.
3. I instructed her to have her husband arrange a phone followup, so I

can
discuss these events further with him. The patient is in agreement with this.
4. She will arrange an appointment after her tests are complete.
5. If these increase or if there is some concern from the husband's history that may represent seizures, will consider repeating an EEG.

KES:cf 09492clf
Dictated: 07/11/2005 12:09 KYLE EUGENE SMOOT, MD
Transcribed: 07/12/2005 08:51 NEUROLOGY

Display transcription (1161894L-1) on 7/11/2005 12:09 PM by SMOOT, KYLE E only

Document history for transcription (1161894L-1) on 7/11/2005 12:09 PM by SMOOT, KYLE E

Medications

Patient Reported Taking

	Dosage
HYDROCODONE-ACETAMINOPHEN 5-500 MG ORAL TAB (Taking/Discontinued)	TAKE ONE TO TWO TABLETS EVERY 4-6 HOURS AS NEEDED FOR PAIN. MAX 8 TABS IN 24 HOURS.
LEVOTHROID 0.1 MG ORAL TAB (Taking)	TAKE ONE TABLET EVERY DAY FOR THYROID.
FOLIC ACID 400 MCG ORAL TAB (Taking)	TAKE ONE TABLET DAILY
LEVOXYL 0.175 MG ORAL TAB (Taking/Discontinued)	TAKE ONE TABLET EVERY DAY (REPLACES 0.2MG DOSE/TABLET)

Orders

Lab and Imaging Orders

	Ordered on
CT HEAD/BRAIN W/O CONTRST MATL (RAD-CTHE1) - Lab and Imaging Orders	7/11/05

Orders

CT HEAD/BRAIN W/O CONTRST MATL (RAD-CTHE1)
REF CARDIOLOGY (IGP)

Visit Diagnoses and Associated Orders

LOSS OF CONSCIOUSNESS [780.09] - Primary
CT HEAD/BRAIN W/O CONTRST MATL (RAD-CTHE1) [70450.050]
REF CARDIOLOGY (IGP) [99201.104]

Level Of Service

OFFICE CONSULT COMP/COMP/MOD 60 [99244]

Provider Information

Authorizing/Billing Provider
SMOOT, KYLE E

Chart Reviewed By

Carl Erling on Wed Jul 13, 2005 10:46 AM
Anthony Klaassen on Wed Jul 27, 2005 1:22 PM

Discharge Disposition

Appendix 9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

TERESA SCHMIDT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SUPERIOR COURT NO.
	)	00-2-12941-1
TIMOTHY P. COOGAN, et al.,	)	
	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on December 19, 2003, the above-entitled and numbered cause came on for hearing before JUDGE DANIEL BERSCHAUER, Thurston County Superior Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter
Certificate No. 2154
P. O. Box 11012
Olympia, WA 98508-1012
(360) 754-3355 Ext. 6484

Exhibit 1

A7

A P P E A R A N C E S

For the Plaintiff:
Via Telephone

DAN'L W. BRIDGES
Attorney at Law
7610 40th Street West
University Place, WA 98466

For the Defendant:
Via Telephone

PAUL LINDENMUTH
Attorney at Law
4303 Ruston Way
Tacoma, WA 98402

December 19, 2003 Olympia, Washington

AFTERNOON SESSION

Department 7 Hon. Daniel Berschauer, Presiding

APPEARANCES VIA TELEPHONE:
Representing the Plaintiff, Dan'l Bridges, Attorney at Law; representing the Defendant, Paul Lindenmuth, Attorney at Law.

Pamela R. Jones, Official Reporter

--oo0oo--

THE COURT: We can go on the record. For the record, this is the case of Teresa Schmidt versus Timothy Coogan, Pierce County Cause No. 00-2-1294-1. The defendant, Timothy Coogan, and his law firm moves for a new trial or, in the alternative, moves for reconsideration of some of the Court's trial decisions or, an additional alternative, for a remittitur.

After oral argument last week, I continued this ruling with the hope that the parties would settle the case. I announced then that I would do something with regard to the defendant's motions as opposed to nothing. This oral decision will outline the relief I have granted to the defendant, Timothy Coogan.

Coogan renews his request for a directed verdict of dismissal because, in his argument,

there is insufficient evidence as a matter of law on the underlying negligence claim against Grocery Outlet. That request is denied.

I adopt my previous ruling made during the trial by simply referencing it. There is sufficient unrebutted evidence and reasonable inferences from that evidence for a reasonable juror to conclude by a preponderance of the evidence that the Grocery Outlet store was negligent.

Mr. Coogan also argues that expert testimony was necessary to support the plaintiff's claim of legal malpractice. I conclude that no testimony is necessary given the fact that Mr. Coogan admitted at that deposition that the conduct that was alleged was negligent, and further given the unrebutted and unchallenged evidence in this case. Again, my previous rulings on the issue are simply adopted by referencing my trial decision.

Based on these two rulings, I conclude that the jury's verdict as to liability is supported by the evidence and the law. Therefore, the defendant's motion for a directed verdict, or, in the alternative for a new trial, are both denied.

The remaining issues relate to the damages

awarded by the jury. For the reasons that follow, the defendant's motion for a new trial is granted as to damages only.

The case law governing granting a new trial is clear. Only unusual circumstances will support such a ruling. For a variety of reasons, I believe such a decision is the only appropriate ruling. I note that I cannot recall granting such a motion but in only one prior case.

This case is an example of what I will refer to as *A Perfect Storm*. What I mean by that analogy is a set of circumstances which occurred in this trial, which as individual issues may not have resulted in my granting a new trial on damages; however, the combination of these occurrences supports my conclusion that justice requires a new trial on the issue of damages.

The first basis for my granting the motion for a new trial is with reference to the closing argument of plaintiff's counsel. Plaintiff's counsel points out that the failure to object and the failure to request a curative instruction is most often deemed a waiver of that right.

The case of Bellevue vs. Kravik correctly notes that absent an objection and request for a

curative instruction, the issue of misconduct of counsel cannot be raised on appeal. However, the case does state there is an exception, if the argument is so flagrant and ill-intentioned that no curative instruction would obviate the prejudice. I specifically note that the argument beginning on Page 44 at Line 21, continuing through to Page 45, Line 10, is a clear request to the jury by Mr. Bridges to punish Mr. Coogan. It's clearly improper. It is clearly ill-intentioned in the sense that plaintiff's counsel sought to support a verdict on untenable grounds. When this comment taken together with the overall tone of plaintiff's counsel's argument, I conclude that the argument is improper, ill-intentioned, and an objection with a curative instruction would not obviate the prejudice.

The second reason I wish to discuss supporting my decision to grant a new trial on the issue of damages is the excessiveness of the damage award. It is clear in the case law that when a jury verdict is deemed excessive by a trial court, that can be the basis for an award of a new trial. I want to briefly quote from an opinion at

Page 24 of Mr. Jensen's brief in support of a motion for a new trial, but there are many cases which state what the case of Lian vs. Stalick holds, and I'm just going to paraphrase some of the quotation, but contained at Page 24.

"The damages must be so excessive as to unmistakably indicate that the verdict was a result of passion or prejudice. It must be outside the range of evidence or so great as to shock the court's conscience, and the passion or prejudice must be of such manifest clarity as to make it unmistakable."

I think all counsel will agree that that is a very large burden for a party seeking to set aside a verdict of a jury based upon its excessiveness, but, in this case, I believe the burden has been satisfied.

First I'll deal with the award of past economic damages. The jury awarded some $32,000 for past economic damages. In my judgment, that is clearly excessive because it is absolutely unsupportable from the evidence in the case. Just as importantly, in my judgment it is a clear indication that that portion of the verdict was affected by prejudice. By itself if it could be

excised from the overall damage award of the jury, this Court may have adjusted that award by way of remittitur. However, I've already indicated and repeat that my decision today is based upon the totality of circumstances.

I also conclude that the award for non-economic damages is clearly excessive as well. In my judgment, this award is well beyond what actually plaintiff's counsel suggested during argument and well beyond what I would consider that is a reasonable range of acceptable jury awards given the evidence in this case. I also must note that this award is also suspect because of the prejudice I've already referred to, and, in my judgment, was clearly demonstrated by the jury's award for past economic damages which could not be supported by any inference from the evidence produced by the plaintiff.

I also accept some responsibility for my ruling regarding insurance. I allowed plaintiff's counsel to ask his client to testify, over objection, to the fact that she lacked medical insurance. I did so to allow her to testify about finance charges which she was claiming as additional damages. In hindsight, I should have

either sustained the objection or at least limited the use of the evidence. What is now clear to me is that the jury may very well have used the evidence of, quote, poverty, unquote, to enhance their award of damages. The excessiveness of the damage award is evidence, in my judgment, that this factor may have played a part in their decision.

I will note for the record that the defendants raise additional issues with regard to the damage claim and the damage award. The defendants argue that there could have been no possible claim for malpractice beyond the underlying negligence claim against the grocery store. The defendants submit that such a claim, if it was to be brought before the jury, would have to be based upon an independent cause of action such as the tort of outrage or negligent infliction of emotional distress.

The defendants also argue that there is no evidence supporting the reasonableness of specific charges for past medical expenses and those bills should have not been presented to the jury. I'm not going to address these issues specifically by way of ruling, but I note they are issues that

will have to be addressed on retrial, and counsel should not try to argue to the new trial judge on retrial that my decisions are binding. I don't intend that they should be binding. I intend that they be reviewed de novo, as I hope any trial judge would.

I've included them here in my list of reasons why a new trial is necessary because I recognize that these are honestly debatable issues and have some overall impact upon granting a new trial. I want to be specific as to why I have not utilized the remittitur procedure. If the constellation of circumstances were not so pervasive I could have done so. For example, if the only error involved an unsupportable award for past economic damages, then a remittitur would have been the appropriate remedy. However, in this case for the reasons already given, I conclude that the combination of circumstances clearly resulted in an excessive award of damages and is clear evidence that the jury unfairly prejudiced Mr. Coogan by its excessive award.

To allow this verdict on damages to stand would be contrary to the principles of justice that I have stood for my entire career. I am

keenly aware that this decision to grant a new trial on the issue of damages will result in additional delay and expense to all parties. I'm also aware even though I am not a citizen of Pierce County, that those citizens through their tax dollars will have to pay for a retrial of this case. I have want to assure counsel that my decision today has not been an easy one. I want to especially acknowledge the difficulty I always have in recognizing my role in this process. I am aware that my decision today is appealable by both parties.

I want to close by once again suggesting that even though I've granted the motion for a new trial as to damages only, I hope that the parties and their lawyers will sit down, explore the possibility of settlement, and, in quoting my former colleague, Robert Doran, exercise all reasonable efforts to resolve this case by settlement. If counsel needs clarification, I will attempt to respond.

MR. LINDENMUTH: Your Honor, Paul Lindenmuth here. Just a couple quick points. I think there's a requirement under the terms of -- I'm not sure which rule, but I think we have to do

findings of fact and conclusions of law to support your order, so could I ask Madam Court Reporter to go ahead and type this up, or Mr. Court Reporter, I'm not sure.

THE COURT: It is Madam Court Reporter.

MR. LINDENMUTH: Madam Court Reporter to type this up, and we would like to order a copy of the transcript so we could draft appropriate findings of fact and conclusions of law.

THE COURT: What I will let you do after we complete the conference call on the record, I will let her talk to you directly and she can tell what you she requires.

MR. LINDENMUTH: Thank you, Your Honor.

THE COURT: Are there any other issues for clarification?

MR. BRIDGES: No.

THE COURT: I do agree with Mr. Lindenmuth, I recall the last time and the only time I've granted a new trial under these circumstances there were findings of fact that I had to make, and obviously the conclusions of law are pretty clear. I would ask counsel to cooperate with each other in producing those findings so that they can be noted for

presentation if they're not agreed upon, or, if agreed upon, they can simply be submitted to me as a matter of formality and by ex parte procedure.

What I also want to indicate is that since I have granted a new trial as to damages, I assume that that automatically stays the previous judgment signed by Judge McCarthy. Do I need to sign a separate order so stating?

MR. BRIDGES: I wouldn't flaunt the intent of your order here today, Your Honor, by trying to execute on that judgment, regardless of what the requirements were.

MR. LINDENMUTH: Your Honor, I may just draw a line in the findings of fact and conclusions of law in that regard, that's fine.

THE COURT: If there are no other questions, that closes these proceedings. I'll let you both remain on the line and you can talk to the reporter.

MR. BRIDGES: I would like to stay on the record for a moment, if I could. My understanding of the Court's ruling is that your oral ruling here today is, of course, instructive to us in terms of drafting findings of fact and conclusions of law, but until the signature entry

of findings of fact and conclusions of law takes place, the calculation of 30 days for the time of appeal does not begin. That's my understanding. You are not trying to direct us based on your oral ruling today for the time for appeal starts today.

MR. LINDENMUTH: Your Honor, I think there has to be an order to trigger an appeal. Whether that would be findings of fact and conclusions of law is beyond my analysis at this time.

MR. BRIDGES: I agree with what Paul just said, but I have seen occasionally in the -- every so often you get situations the court will note that the trial court went to such length in their oral opinion, I don't want there to be any confusion as to when the clock starts ticking.

THE COURT: I can't speak to when the time for appeal runs. What I can say is that I believe until I sign a formal order granting a new trial that there's nothing from which to appeal. Now, I can't speak any more than saying that, but that's my understanding.

As far as the calculation of that time, that would be an advisory opinion of which I am not prepared to give.

MR. BRIDGES: Right. I suppose it's rather moot. I wouldn't wait until the last day anyway.

MR. LINDENMUTH: I think there has to be at least an order, whether it's the actual findings of fact and conclusions of law, whether it's the final order, the clock starts ticking.

MR. BRIDGES: And, as I understand, defendant did not submit anything for you to sign today, Judge.

THE COURT: I'm not signing anything today and I would not sign it unless it had been an agreed order or unless it had been formally presented for presentation.

MR. BRIDGES: I apologize, Your Honor. This is presumptuous. A lot of this is logistics.

THE COURT: Let's go off the record.

* * * * *

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 5th day of January, 2004.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

TERESA SCHMIDT, Plaintiff v. TIMOTHY P. COOGAN and "JANE DOE" COOGAN and the marital community comprised thereof; and THE LAW OFFICES OF TIMOTHY PATRICK COOGAN and all partners thereof, Defendant.	NO. 00-2-12941-1 DEFENDANT COOGAN'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

THIS MATTER having come before this Court on Defendant's Motion for a New Trial/Remittitur and/or for Reconsideration and the Court having considering the submissions of the party and oral argument of counsel for the Plaintiff, Dan'l W. Bridges and Paul Lindenmuth hereby makes the following Findings of Facts and Conclusions of Law and Order Granting a New Trial Limited to the Issues of Damages Only.

I. FINDINGS OF FACTS

1.1 That this matter was tried before a jury of 11 from the period of November 17 through November 19, 2003. The jury herein rendered a verdict in favor of the Plaintiff, Teresa Schmidt on

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Exhibit 2

November 20, 2003 on a claim of legal malpractice, (professional negligence,) in the gross amount of $212,000.00. The verdict was comprised of $32,000.00 for "past economic damages" and $180,000.00 for her "non-economic damages."

1.2 During the course of trial Defendant moved for a directed verdict of dismissal at the close of Plaintiff's case in chief on the grounds that Plaintiff failed to present sufficient evidence to establish a prima facie case of the grocery store's negligence in the underlying slip and fall case, which for the purposes of this legal malpractice case constitutes the case within the case. The Court denied Defendant's motion for dismissal.

1.3 During the course of trial, Plaintiff presented four lay witnesses including herself and one medical witness regarding her personal injuries. During the course of trial the Plaintiff presented no legal expert testimony to establish or explain to the jury the standard of care applicable to an attorney practicing law within the State of Washington.

1.4 During the course of trial, the Court finds that the Plaintiff presented sufficient evidence with respect to the case within a case, that the grocery store, who was the Defendant in the underlying case, was negligent. The Court finds that there was sufficient evidence for a reasonable jury to conclude, based on the preponderance of the evidence, that the Grocery Outlet, the Defendant in the underlying case, was negligent.

1.5 The Court finds that the evidence was sufficient on the issue of professional negligence and under the facts of this case, it was not necessary for the Plaintiff to call a legal expert to establish the standard of care applicable to legal practitioners within the State of Washington.

1.6 During the course of trial, a number of events occurred which have caused the Court to conclude that a new trial on the issue of damages is appropriate. The first and most paramount consideration in the grant of a new trial in this case, was the closing argument of Plaintiff's counsel. During the

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course of closing argument, Plaintiff's counsel argued without objection for a punitive result. The Court specifically finds that the argument of Plaintiff's counsel, was so flagrant and ill-intentioned, that no curative instruction would have obviated the prejudice created by it. The argument was ill-intentioned in the sense that Plaintiff's counsel sought to support a verdict by the jury based on untenable grounds. When the comments of Plaintiff's counsel are taken together, the trial court concludes that the argument was improper, ill-intentioned, and an objection with a curative instruction would not have obviated the prejudice. ~~Such findings are predicated on no only the words used by Plaintiff's counsel, as reflected in the transcript, but also the Court's first hand observations, which occurred during the course of trial.~~

1.7 In addition, the Court finds that the damages awarded in this case to the Plaintiff are so excessive, based on the evidence presented before the jury as to be unmistakably indicative of the operation of "passion and prejudice."

1.8 In the instant matter the jury award of the sum of$32,000.00 for past economic damages, is clearly excessive, because it is absolutely unsupported by any evidence presented before the jury. In addition, the non-economic damages awarded are also so clearly excessive as to unmistakably indicate the operation of "passion and prejudice." It is noted that the amount awarded is substantially greater than the amount suggested by Plaintiff's counsel during closing argument, and well beyond what the Court considers to be within the reasonable range of an acceptable jury verdict, given the evidence presented in this case.

1.9 The Court finds that the excessiveness of the jury verdict is indicative of the "passion and prejudice" created by the improper closing argument of Plaintiff's counsel.

1.10 In addition, during the course of trial evidence was submitted by the Plaintiff that the Plaintiff lacked medical insurance to pay her medical bills, and that she had been subject to finance charges.

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In hindsight, the allowance of such evidence was error. The financial condition of the Plaintiff is irrelevant, and ~~constitutes an irrelevant plea of poverty, which is designed to inflame the "passion and prejudices" of the jury.~~

1.11 That the Court finds that the cumulative effect of the above was unfairly prejudical to the Defendants and denied the Defendants a fair trial.

1.12 That the Court intends the Findings of Facts and Conclusions of Law set forth herein to be interpreted in conformance with the Court's oral ruling of December 19, 2003, which is attached hereto as Exhibit No. 1 to these findings and conclusions and order,

II. CONCLUSIONS OF LAW

2.1 To the extent that the above Findings of Facts should be deemed Conclusions of Law, and the Conclusions of Law set forth below, should be deemed Findings of Facts, it is the Court's intention that they be treated as any reviewing court deems appropriate.

2.2 The grant or denial of a new trial is a matter that rests within the trial court's discretion. In the exercise of such discretion, the trial court concludes that the Defendant in this matter was denied a fair trial.

2.3 The Court specifically concludes that a new trial on the issue of damages only is warranted on a number of the grounds set forth in CR 59. The Court specifically finds that a new trial is warranted under CR 59 (a) (1) based on an "irregularity" in the proceeding created by an adverse party, i.e., the improper closing argument of Plaintiff's counsel.

2.4 In addition, pursuant to CR 59 (a) (5), the Court finds that the damages are so excessive as to unmistakably indicate that the verdict must have been the result of "passion and prejudice." This conclusion is not only supported by the size of the verdict, but also the events discussed above that occurred during the course of trial.

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2.5 The Court concludes, that pursuant to CR 59 (a) (7), that the verdict for non-economic damages is not supported by the evidence. The Court specifically finds that there was no evidence nor reasonable inferences from of the evidence to justify or support the verdict for non-economic damages.

2.6 The Court also finds that pursuant to CR 59 (a) (8) that an error of law occurred during the course of trial that was objected to by the defense in this matter, to wit the allowance of lack of insurance testimony to be presented during the course of trial.

2.7 Finally, the Court concludes that pursuant to CR 59 (a) (9), that substantial justice has not been done in this case. The lack of substantial justice is a by-product of the cumulative events occurring during the course of trial that prevented the Defendants in this matter from receiving a fair trial.

III. ORDER

THEREFORE, the Court filly advised of the premises, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant's Motion for a new trial on the issues of Damages Only is hereby GRANTED; it is also further

ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Dismiss and/or for Judgment as a Matter of Law and Remittitur with respect to the issues of attorney negligence and negligence in the underlying case, is hereby DENIED; it is further

ORDERED, ADJUDGED and DECREED that this Court declines to rule on Defendant's contention that no damages are available for legal malpractice beyond those that would have been available, had there been success in the underlying case, and reserves this issue for resolution during the course of re-trial of this case, it is further

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ORDERED, ADJUDGED and DECREED that the judgement previously entered in this matter is hereby vacate.

Dated this 7 day of January, 2005.

Judge Daniel Berschauer

Presented by:

Paul A. Lindenmuth, WSBA #15817
Of Attorneys for Defendant

Approved as to Form;
Notice of Presentment Waived:

Dan'l W. Bridges, WSBA #24179
Attorney for Plaintiff

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Exhibit 1

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	NO. 00-2-12941-1
	JUDGE DANIEL J BERSCHAUER
SCHMIDT, TERESA Plaintiff(s),	CT REPORTER PAM JONES
vs.	CLERK EDISON HERRON
COOGAN, TIMOTHY Defendant(s).	DATE: DECEMBER 19, 2003

Plaintiff Appearing: ☒Yes ☐ No
Attorney for Plaintiff: DAN'L BRIDGES
Present: ☒ Yes ☐ No

Defendant Appearing: ☒Yes ☐ No
Attorney for Defendant: PAUL LINDENMUTH
Present: ☒ Yes ☐ No

THIS MATTER CAME ON BEFORE THE COURT FOR: ORAL RULING

3:10 Court called into session, both parties participated by way of teleconference. Court addressed the parties on the matter and indicated that it was prepared to give its oral opinion.

Court granted a new trial, only on the damages issue. Court addressed the parties on its ruling.

Court answered any questions for clarification. Court will sign order and findings of fact when presented.

3:26 Court adjourned.